

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	WT Docket No. 17-79
Accelerating Wireless Broadband Deployment	)	
by Removing Barriers to Infrastructure	)	
Investment	)	
	)	WC Docket No. 17-84
Accelerating Wireline Broadband Deployment	)	
by Removing Barriers to Infrastructure	)	
Investment	)	

**COMMENTS OF EXTENET SYSTEMS, INC.**

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## EXECUTIVE SUMMARY

ExteNet strongly supports the Commission's efforts to implement comprehensive, long-term infrastructure deployment reform. For providers of Distributed Network Systems ("DNS"), including small cells and DAS facilities, such reform is needed now: regulatory impediments have substantially delayed or in some cases foreclosed DNS deployments that are essential to delivery of advanced wireless services, including 5G. ExteNet agrees with the Commission that "there is an urgent need to remove any unnecessary barriers to such deployment[s], whether caused by Federal law, Commission processes, local or State reviews or otherwise."

ExteNet has extensive first-hand experience with barriers to deployment. Since 2002, ExteNet has worked with State and local officials to obtain approval of hundreds of DNS deployments and thousands of individual antenna locations through which it provides telecommunications services to wireless carriers. Time and again, local governments have denied ExteNet timely access to poles in public rights-of-way. ExteNet has frequently endured permit application processing delays of at least six months to a year, with some delays lasting more than two years. Conversely, similar permits for wireline providers and utilities are usually granted in a matter of days, or weeks at most.

To address these DNS deployment delays, the Commission should modify its shot clocks that apply to applications for DNS collocations and support structures in public rights-of-way. Among other things, the Commission should shorten its shot clock applicable to DNS collocations (not otherwise covered by the Spectrum Act) from 90 to 60 days, and shorten its shot clock applicable to DNS new poles from 150 to 90 days. Equally important, the Commission should adopt a "deemed granted" remedy where a local government fails to act on applications outside the context of the Spectrum Act.

Delay, however, is not the only serious impediment to DNS deployment. DNS providers also are routinely subject to discriminatory treatment by local governments. A substantial number of communities require ExteNet to follow application processes and deployment standards different than those of similarly-situated wireline providers and utilities, even though ExteNet's pole attachments impose no greater burden on the public rights-of-way. Indeed, ExteNet's facilities must often go through discretionary, lengthy and burdensome zoning processes, but wireline and utility attachers do not.

Moreover, local governments impose restrictions on DNS providers that have nothing to do with management of public rights-of-way. For example, local governments often slow the permitting process down by inquiring as to matters such as finances, ownership, system design, coverage and technical need, none of which relate to rights-of-way management. In other cases, local governments impose aesthetic requirements on DNS providers based on subjective considerations (*e.g.*, "character of the neighborhood"). Local governments have also demanded that ExteNet pay excessive fees for access to public rights-of-way.

To address these DNS deployment barriers, the Commission should issue a declaratory ruling interpreting the protections in Sections 253 and 332(c)(7) of the Communications Act. First, the Commission should define Section 253(a)'s "prohibit or have the effect of prohibiting" standard in accordance with the Commission's *California Payphone* ruling and the Ninth

Circuit’s *City of Auburn* decision. The Commission should declare that Section 253(a) prohibits any process that gives jurisdictions excessive discretion over whether to grant or deny a DNS application or imposes onerous application requirements. The Commission should reaffirm that a DNS provider does not have to demonstrate that a restriction is insurmountable in order to succeed with a Section 253 claim. Also, the Commission should clarify that the Section 253(a) “prohibit or have the effect of prohibiting” standard is not the same as the judicially-crafted Section 332(c)(7) “effective prohibition” standard.

Second, the Commission should define a local government’s right to “manage public rights-of-way” under Section 253(c) narrowly, consistent with precedent. That right should include only those tasks necessary to preserve the physical integrity of the rights-of-way, control the orderly flow of vehicles and pedestrians, and otherwise protect the health, safety, and welfare of the public. The Commission should also declare that restrictions imposed on a DNS provider but not on other public rights-of-way users are discriminatory and thus contrary to both Section 253(a) and Section 253(c).

Third, the Commission should clarify that the Section 253(c) requirement that public rights-of-way fees be “fair and reasonable” means that State or local governments cannot treat rights-of-way as revenue-generating private property. Again consistent with precedent, the Commission should declare that a State or local government may not impose a public rights-of-way fee on a DNS provider that exceeds its direct cost of managing the provider’s use of the public rights-of-way. The Commission should reaffirm that rights-of-way fees must be “competitively neutral and nondiscriminatory” and “publicly disclosed,” as required by Section 253(c).

In addition, the Commission should further streamline environmental, historic preservation, and Tribal reviews to accelerate DNS deployments. DNS facilities should be categorically excluded from NEPA review, and the Commission should revise its NHPA categorical exclusions to provide greater clarity and maximize the exclusions applicable to minimally impactful DNS facilities. ExteNet also supports the joint CTIA/WIA comments on Tribal review issues being submitted on this date in WT Docket 17-79.

Finally, the Commission should reform its pole attachment rules and procedures by, *inter alia*, shortening its current pole attachment timeline, publishing a “safe harbor” uniform attachment agreement, modifying its rules relating to the make-ready process, and adopting a shot clock for pole attachment complaints. By taking these steps and the others recommended above, the Commission will help speed the deployment of 5G-enabling DNS facilities, to the benefit of consumers.

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**COMMENTS OF EXTENET SYSTEMS, INC.**

ExteNet Systems, Inc. (“ExteNet”) hereby submits its comments in response to the Commission’s Notices of Proposed Rulemaking and Notices of Inquiry in the above-captioned proceedings.<sup>1</sup>

**I. INTRODUCTION.**

ExteNet strongly supports the Commission’s efforts to promote the deployment of advanced telecommunications networks. This proceeding is especially important to providers of

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<sup>1</sup> ExteNet is filing these comments in both the wireless and wireline infrastructure dockets, WT Docket No. 17-79 and WC Docket No. 17-84, addressing issues in both proceedings common to DNS providers. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (rel. Apr. 21, 2017) (“*Wireless NPRM/NOI*”); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (rel. Apr. 21, 2017) (“*Wireline NPRM/NOI*”). ExteNet already has addressed some of these issues in its comments and reply comments in WT Docket No. 16-421, copies of which are attached and hereby incorporated by reference. *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360 (WTB 2016) (“*Wireless Streamlining Public Notice*”); Comments of ExteNet Systems, Inc., WT Docket No. 16-421 (filed Mar. 8, 2017) (“ExteNet Public Notice Comments”) (attached as Exhibit 1); Reply Comments of ExteNet Systems, Inc., WT Docket No. 16-421 (filed Apr. 7, 2017) (attached as Exhibit 2).

distributed network systems (“DNS”), which include individual nodes in a DAS network, stand-alone small cell installations that are not part of a DAS network, and other similar small deployments using alternate technologies that satisfy the following volumetric and height/location limitations:<sup>2</sup>

- ***DNS volumetric limits.*** A facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the volumetric calculation: electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services.
- ***DNS height/location limits.*** Installations on poles or other support structures that are located in the public rights-of-way and that are no greater than 50 feet above ground level or ten feet in height above the tallest existing utility pole within 500 feet of the installation, whichever is greater.

As the Commission recognizes, marketplace developments require “an updated regulatory framework that promotes and facilitates next generation network infrastructure facility deployment.”<sup>3</sup> Commission action is imperative, as demand for mobile wireless data is expected to continue to increase exponentially with the advent of 5G and the Internet of Things.<sup>4</sup> To accommodate this demand, wireless providers must increase the capacity of their networks within a relatively short period of time. This increase in capacity cannot be accomplished solely through deployment of larger “macro” cell sites that cover wide geographic areas; it requires

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<sup>2</sup> This dual-pronged DNS definition is derived from the Commission’s *First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 47 C.F.R. Pt. 1, App. B (Aug. 29, 2016) (OMB approval pending), and in legislation recently passed in Ohio (SB 331) and Virginia (SB 1282).

<sup>3</sup> *Wireless NPRM/NOI* ¶ 1.

<sup>4</sup> *Id.*

densification of networks through deployment of DNS facilities in urban and other areas that have a greater localized demand for bandwidth.<sup>5</sup>

Because DNS facilities have much smaller coverage areas, they must be deployed in many locations to operate effectively.<sup>6</sup> In a typical DNS deployment, ExteNet may be required to work with multiple municipalities at the same time. Access to poles in public rights-of-way (alternatively referred to herein as “ROWS”) is therefore essential for timely DNS deployment – indeed, public ROWs are often the *only* way to effectively deploy DNS and other wireless facilities, especially in urban areas. Consequently, State and local obstacles to DNS use of public ROWs have a direct and immediate chilling effect on DNS deployments and, ultimately, the provision of advanced wireless broadband services, including 5G.

ExteNet has substantial first-hand experience with such obstacles. Since 2002, ExteNet has been working with state and local officials to obtain approval for the hundreds of DNS deployments and thousands of antenna locations through which it provides telecommunications services to wireless carriers. To be sure, many communities have worked cooperatively with ExteNet. Far too often, however, local governments impose barriers to entry that impede ExteNet’s access to poles in public ROWs. These barriers typically are not imposed on wireline or utility pole attachments, even though ExteNet’s equipment is substantially similar to or even smaller than wireline or utility equipment. These barriers, in turn, interfere with the ability of

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<sup>5</sup> See *Wireless Streamlining Public Notice*, 31 FCC Rcd at 13360 (“[W]ireless companies are actively expanding the network capacity needed to maintain and improve the quality of existing services and to support the introduction of new technologies and services. In particular, many wireless providers are deploying small cell and distributed antenna systems (DAS) to meet localized needs for coverage and increased capacity in outdoor and indoor environments.”) (citation omitted).

<sup>6</sup> *Id.*



ExteNet's wireless carrier customers to satisfy skyrocketing consumer demand for mobile broadband.

Accordingly, for the reasons set forth below, the Commission should take the following steps to remove State and local barriers to DNS deployment:

- ***Address DNS deployment delays.*** To address DNS deployment delays, the Commission should: (i) accelerate its shot clocks applicable to DNS collocations to 60 days and new DNS poles to 90 days; (ii) adopt a “deemed granted” remedy for shot clock violations; and (iii) limit any pre-application period for negotiations between a DNS provider and a local government to 60 days;
- ***Address DNS deployment barriers.*** To address DNS deployment barriers, the Commission should: (i) clarify the meaning of “prohibit or have the effect of prohibiting” and “manage the public rights-of-way” in Sections 253(a) and 253(c) of the Communications Act (the “Act”), respectively; (ii) affirm that requirements imposed on DNS providers but not on other public ROW users violate Section 253(a) and are not “saved” by Section 253(c); and (iii) clarify that ROW fees must not exceed a locality’s direct management costs, must be competitively neutral and nondiscriminatory, and must be publicly disclosed;
- ***Further streamline environmental reviews.*** To speed DNS deployments, the Commission should take steps to further streamline its National Environmental Policy Act (“NEPA”) reviews, National Historic Preservation Act (“NHPA”) reviews, and Tribal reviews; and
- ***Reform its pole attachment rules.*** To ensure timely DNS access to poles, the Commission should: (i) accelerate its pole attachment timeline; (ii) accelerate make-ready work processes; (iii) clarify that a DNS “attachment” includes the antenna and all attached appurtenances; (iv) limit make-ready charges to actual costs; and (v) adopt a 75-day shot clock to resolve pole attachment complaints.

## **II. THE COMMISSION SHOULD ADDRESS EXCESSIVE DELAYS IN THE PROCESSING OF DNS REQUESTS TO DEPLOY IN PUBLIC ROWS.**

ExteNet's experience confirms that local approval processes are substantially delaying DNS deployments. While the FCC's Section 332(c)(7) shot clocks were a step in the right direction, they often have not prompted local authorities to act expeditiously on DNS applications. The absence of a “deemed granted” remedy where a local government does not act within the Section 332(c)(7) shot clocks, combined with the absence of a limitation on pre-

application negotiation periods, has only exacerbated the problem. The Commission should therefore act now to accelerate its Section 332(c)(7) shot clocks applicable to DNS deployments, adopt a “deemed granted” remedy for Section 332(c)(7) shot clock violations, and limit pre-application negotiation periods to 60 days.

**A. DNS Providers Continue to Encounter Significant Deployment Delays.**

Evidence compiled by ExteNet confirms that local permitting processes have significantly delayed DNS deployments, and that Commission action to address these delays is necessary.<sup>7</sup>

ExteNet studied a total of 100 communities where it deployed DNS facilities in 2015 and 2016. In 30% of these communities, the permitting process took between six and twelve months. In 17% of the deployments, the process took more than 12 months, with some taking more than two years. Thus, even after applying the longest possible “reasonable” time under the Commission’s Section 332(c)(7) shot clock, *i.e.*, 150 days (the time limit applied to non-collocations, including new poles), ExteNet could have filed a complaint for a shot clock violation in 47 communities.<sup>8</sup> This means that *nearly half of all surveyed communities failed to*

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<sup>7</sup> See *Wireless NPRM/NOI* ¶ 6 (asking commenting parties to submit “facts and evidence” relevant to proposals to address delays in the local permitting process); ExteNet Public Notice Comments at 5-10.

<sup>8</sup> See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, 14005 ¶ 32 (2009) (“2009 Shot Clock Declaratory Ruling”), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013). In its 2009 Shot Clock Declaratory Ruling, the Commission determined that a “reasonable period of time” to act under Section 332(c)(7)(B)(ii) is 90 days for collocation applications and 150 days for all other types of applications. In 2014, the Commission clarified that a DNS deployment involving a new pole would trigger the 150-day shot clock, and that a DNS attachment to an existing pole or structure would be subject to the 90-day shot clock. See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12974 ¶ 272 (2014) (“2014 Wireless Infrastructure Order”) (noting that “DAS and small-cell

act within the longest possible “reasonable” period of time allowed by the Section 332(c)(7) shot clock. That is a conservative estimate, because most of ExteNet’s applications were collocations on existing utility poles that would have been subject to a 90-day shot clock.<sup>9</sup> Thus, the number of communities in ExteNet’s survey that violated the shot clock is actually higher. Moreover, these statistics do not include communities where ExteNet decided not to deploy due to time-consuming and burdensome local requirements.<sup>10</sup>

Many of the delays cited above are attributable to the fact that local governments frequently require requests to deploy DNS facilities to go through formal zoning procedures that are more appropriate for “macro” towers. In 2015 and 2016, 41 of the communities surveyed by ExteNet demanded that ExteNet’s applications be subject to some form of discretionary review, with 36 of the 41 communities requiring ExteNet to go through formal zoning procedures, which are lengthy, expensive and discretionary.<sup>11</sup> For example, zoning applications typically require ExteNet to produce and submit detailed, complex plans and materials. Local governments, often

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deployments that involve installation of new poles will trigger the 150-day time period for new construction”), *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

<sup>9</sup> In its *2014 Wireless Infrastructure Order* the Commission implemented Section 6409(a) of the Spectrum Act, creating a new 60-day shot clock within which local authorities must act on a narrower category of “eligible” collocations on a tower or on a non-tower structure with an existing approved antenna. *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12956-57 ¶ 215. Many of the ROW poles on which ExteNet deploys DNS attachments lack an existing antenna, however, and therefore the 90-day collocation shot clock – and not the Section 6409(a) 60-day shot clock – applies.

<sup>10</sup> See, e.g., Comments of the Wireless Infrastructure Association, WT Docket No. 16-421, at 6 (filed Mar. 8, 2017) (“WIA Public Notice Comments”) (“WIA members have uniformly reported on the epidemic of significant delays experienced in jurisdictions throughout the country when seeking to deploy small wireless facilities in the public right-of-way.”); Comments of T-Mobile USA, Inc., WT Docket No. 16-421, at 6 (filed Mar. 8, 2017) (“If the city has a working small cell review process in place, the application can be approved in a matter of weeks – but if the city uses a traditional macrocell approach . . . , half a year or more is the norm.”).

<sup>11</sup> See WIA Public Notice Comments at 12 (describing delays created by imposition of zoning requirements on small cell facilities).

at the urging of consultants, require extensive engineering studies and photos of the surrounding area and proposed installation; information regarding all surrounding wireless facilities for distances up to a mile or more; and detailed radiofrequency (“RF”) studies. Applications are repeatedly rejected or returned, either for “missing” information or because the local government demands more information than originally requested.

Once they are finally accepted, applications are often subject to multiple layers of review and public comment. Each layer of the process can take weeks or months, and at any juncture a motivated member of the public or staff member can effectively stop a deployment.

Applications face at least one and frequently multiple public hearings. At those hearings, local residents can and do object to and oppose applications, often on purely “not in my back yard” grounds. Moreover, zoning codes almost always vest the local government with essentially unfettered discretion to deny an application for virtually any reason, including subjective criteria such as “compatibility” with the character of the area. When applying those criteria, local governments often ignore the fact that the installation is in a public right-of-way that is already a corridor for utility use.

Other factors cause delay as well. In 43% of the communities surveyed by ExteNet, the local government had no clear process for applications to install DNS facilities on poles in the public ROW. These communities often make up the rules as they go (usually leaning in the direction of formal zoning review), with antipathy towards the prospect of allowing RF emitting devices in the public ROW. In addition, local governments often demand that ExteNet enter into an agreement to occupy the public rights-of-way (whether called a franchise, license, access agreement, or some other name). Fifty-three percent of the surveyed communities demanded such an agreement from ExteNet, but 60% of those communities did not even have a form

agreement. Again, wireline telecommunications providers and other utilities with equipment in the ROW were not required to enter into any kind of agreement to access the ROW.

**B. The FCC Should Accelerate Its Shot Clocks for DNS Collocations and Support Structures in Public ROWs.**

To help remediate the delay problem, the Commission should accelerate its Section 332(c)(7) shot clocks in two ways. First, the Commission should adopt its proposal to reduce the shot clock applicable to collocations, including DNS attachments, from 90 to 60 days. As the Commission notes, this would “harmonize the shot clocks for applications that are not subject to [Section 6409(a) of] the Spectrum Act with those that are, so that . . . the time period deemed reasonable for non-Spectrum Act collocation applications would change from 90 to 60 days.”<sup>12</sup> Second, the Commission should accelerate the shot clock for all other non-collocation applications, including those for new DNS poles, from 150 days to 90 days.<sup>13</sup>

These timeframes are reasonable, especially in comparison to processing timelines for other similarly-situated ROW users. For example, wireline ROW applications are usually processed in a matter of a few days, or a few weeks at most, involving dozens or hundreds of poles.<sup>14</sup> DNS attachments are often the same size as or smaller than wireline and utility

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<sup>12</sup> *Wireless NPRM/NOI* ¶ 18 (citation omitted); *see also Wireline NPRM/NOI* ¶ 103.

<sup>13</sup> ExteNet generally seeks to deploy its DNS facilities using existing pole infrastructure. Nonetheless, there are various circumstances beyond ExteNet’s control. ExteNet often is required to set replacement poles, which some jurisdictions treat as essentially new poles. Other times the issue is driven by utility pole owners. In one state where pole attachments are not within the FCC’s jurisdiction, the dominant utility has simply refused to allow wireless attachments. In many other instances, although the utility does not explicitly prohibit wireless facilities, it will impose so many conditions and limitations that many individual poles are effectively unusable. As a result, ExteNet may be forced to propose to install its own pole. Sometimes, the need for new poles is driven by the local government itself. But, there may be different opinions within the local government about whether existing poles or new poles are preferable, leaving ExteNet caught in the middle, unable to deploy.

<sup>14</sup> *See* ExteNet Public Notice Comments at 8-9.

attachments, and impose no greater burden on the public ROW. In fact, in the *2014 Wireless Infrastructure Order*, the Commission recognized that DNS equipment can be installed “with little or no impact.”<sup>15</sup> Thus, there is no reason why DNS deployment requests cannot be processed under these accelerated timelines.

In addition, acceleration of the “default” 90-day collocation shot clock to 60 days is necessary to eliminate the loophole in the Commission’s implementation of Section 6409(a) of the Spectrum Act. As noted above, Section 6409(a)’s 60-day shot clock applies only to eligible collocations on towers or on existing structures (including poles) that already have an antenna attached to them.<sup>16</sup> As a result, the 60-day Section 6409(a) shot clock presently does not apply to DNS installations on existing poles that lack an existing antenna. There is no meaningful distinction between a DNS installation on an existing pole that has an antenna attached to it versus an existing pole that does not. In both cases, the largest intrusion into the right-of-way is the underlying pole, which is already in place. Accordingly, the two types of installations should be subject to the same 60-day shot clock.

The revised shot clocks proposed above should begin upon the filing of a permit application. If a local government does not have an application process or ordinance to follow, the provider’s filing of documentation explaining the proposed deployment should be deemed an “application” that triggers the shot clock. A provider should not be required to wait until a local government has a formal process or ordinance in place, which acts as a *de facto* moratorium and defeats the purpose of the shot clocks.

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<sup>15</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12867 ¶ 3.

<sup>16</sup> *Id.* at 12935 ¶ 168; *see also supra* note 9.

ExteNet agrees that the Commission should not depart from its earlier conclusion that the shot clock deadlines continue to “run[] regardless of any moratorium.”<sup>17</sup> The Commission should reemphasize this point to remind local governments that they cannot evade the shot clock by imposing moratoria – whether actual or *de facto* – on DNS applications. While in some cases local governments will rescind their moratoria once ExteNet threatens litigation over the shot clock, the larger problem is that moratoria are a clear barrier to entry and thus should be preempted.<sup>18</sup>

The Commission should not adopt a longer shot clock for batches of multiple DNS applications.<sup>19</sup> As noted above, wireline applications involving dozens or hundreds of poles are approved in days or weeks.<sup>20</sup> In the absence of municipally-imposed conditions that require substantial review time and which should be prohibited as an outcome of this proceeding, there is simply no justification for subjecting batches of DNS applications to longer review periods. A

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<sup>17</sup> *Wireless NPRM/NOI* ¶ 22 (quoting *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971 ¶ 265); see also *Wireline NPRM/NOI* ¶ 102.

<sup>18</sup> See Comments of CTIA, WT Docket No. 16-421, at 12 (filed Mar. 8, 2017) (“Some localities have adopted siting moratoria that expressly prohibit any new wireless deployment in ROWs. Others have imposed *de facto* moratoria by declining to process applications to locate new wireless facilities or modify existing facilities, informing providers that new regulations governing small cells must first be adopted. Although localities claim that they need time to enact those new regulations, that claim does not justify the long or open-ended moratoria that CTIA’s members are encountering. Moratoria unquestionably violate Section 253(a) because they constitute a total bar to a provider’s construction of new facilities needed to provide service.”).

<sup>19</sup> *Wireless NPRM/NOI* ¶ 18 (requesting comment on appropriate shot clock for “‘batches’ of requests submitted by a single provider to deploy multiple related facilities in different locations”).

<sup>20</sup> See ExteNet Public Notice Comments at 8-9.

longer shot clock also might discourage a DNS provider from batching its applications, even where batching creates efficiencies for both the provider and the local government.<sup>21</sup>

**C. A “Deemed Granted” Remedy Should Be Imposed Where a Local Government Fails to Act within the Relevant Shot Clock.**

The Commission should adopt a “deemed granted” remedy where a State or local government fails to observe the shot clocks for applications outside the context of Section 6409(a).<sup>22</sup> In the absence of a deemed granted remedy, shot clock violations merely give the applicant the right to pursue lengthy litigation.<sup>23</sup> This situation is untenable.

ExteNet’s experience demonstrates why the adoption of a deemed granted remedy is critical, particularly for DNS providers. Over a two year period (2015-2016), ExteNet would have had to file a federal lawsuit at least 47 times to obtain relief from shot clock violations. Those lawsuits would have taken months to reach summary judgment, and, even if a court found a shot clock violation, there is a risk that the court’s “remedy” may be to remand the matter back to the local government with only an order to finally issue a decision.<sup>24</sup> Given the anticipated number of DNS deployments needed to meet consumer demand for advanced wireless services like 5G, case-by-case litigation for shot clock violations is simply not an option.

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<sup>21</sup> ExteNet often batches applications based on DNS clusters rather than whole projects, to balance the benefits and burdens of batching to and on local governments.

<sup>22</sup> *Wireless NPRM/NOI* ¶ 9. The Commission has already adopted a “deemed granted” remedy where a jurisdiction fails to act on a Section 6409(a) collocation application within the 60-day shot clock. *See 2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12961 ¶ 226.

<sup>23</sup> *See generally 2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14008-09 ¶¶ 37-39.

<sup>24</sup> *See, e.g., Up State Tower v. Town of Kiantone*, 2016 U.S. Dist. LEXIS 170827 (W.D.N.Y. Dec. 9, 2016); *see also* Comments of Verizon, WT Docket No. 16-421, at 23 (filed Mar. 8, 2017) (“Verizon Public Notice Comments”) (“Applicants will often conclude that it is quicker and more effective to grant local authorities additional time to review applications than to sue to enforce a remedy, and doing so ensures better relations with the local authority.”).



ExteNet thus supports the adoption of a “deemed granted” remedy where a community fails to act within the applicable Section 332(c)(7) shot clock. That is, if a local government fails to grant or deny a permit application by the relevant Section 332(c)(7) shot clock deadline, the application is deemed granted – a DNS provider would not be required to go to court to enforce its rights under the shot clock. Rather, as is the case with the “deemed granted” remedy for 6409(a) shot clock violations, the remedy would become effective when the applicant notifies the reviewing jurisdiction in writing that the application has been deemed granted.<sup>25</sup>

The Commission has the necessary legal authority to adopt a “deemed granted” remedy for its Section 332(c)(7) shot clocks, and may do so using one or more of the three mechanisms proposed in the *Wireless NPRM/NOI*. First, the Commission should adopt an irrebuttable presumption that the Commission’s shot clock deadlines are reasonable, thereby “‘set[ting] an absolute limit that – in the event of a failure to act – results in a deemed grant.’”<sup>26</sup> Nothing in Section 332(c)(7) precludes such an approach, and the Fifth Circuit’s decision in *City of Arlington* confirmed the Commission’s broad authority to interpret ambiguities in the statute, in a manner consistent with the statute’s purpose and Congressional intent.<sup>27</sup>

Second, the Commission should interpret Section 332(c)(7) to find that State or local authority over siting decisions in Section 332(c)(7)(A) lapses where a State or local government fails to meet its obligation under Section 332(c)(7)(B)(ii) to act on a siting application “within a

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<sup>25</sup> See *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12961 ¶ 226.

<sup>26</sup> *Wireless NPRM/NOI* ¶ 10 (quoting *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12957 ¶ 216).

<sup>27</sup> See *Wireless NPRM/NOI* ¶ 11. The Commission also notes that adoption of a “deemed granted” remedy under the Section 332(c)(7) shot clocks would be permissible under the Tenth Amendment, per the Fourth Circuit’s analysis in *Montgomery County v. FCC*. *Id.* ¶ 13.

reasonable period of time,” *i.e.*, within the relevant Section 332(c)(7) shot clock.<sup>28</sup> Here again, Section 332(c)(7) is silent on this point, and the Commission has broad discretion per *City of Arlington* to interpret the statute’s ambiguity. The Commission’s proposal is a rational interpretation of the phrase “except as provided” in Section 332(c)(7)(A), particularly given what Congress was trying to accomplish in Section 332(c)(7). As noted in *City of Arlington*:

Section 332(c)(7) seeks to reconcile two competing interests – Congress’s desire to preserve the role of local governments in regulating land use and zoning and Congress’s interest in encouraging the rapid development of new technologies *by removing the ability of state and local governments to impede the construction and modification of wireless communications facilities through delay or irrational decisionmaking.*<sup>29</sup>

In Section 332(c)(7)(B)(ii), Congress sought to achieve this balance by *mandating* that State and local governments act on wireless siting applications within a reasonable period of time.<sup>30</sup>

Congress could not have intended to give State and local governments indefinite authority over wireless siting applications when they fail to observe that mandate.

Third, the Commission should promulgate a deemed granted rule to implement the policies in Section 332(c)(7) and to harmonize remedies available for violations of Section 332(c)(7) and Section 6409(a) and the Commission’s implementing rules.<sup>31</sup> Just as there is no reason for having different shot clocks for Section 332(c)(7) and Section 6409(a) collocations, there is no reason to have a deemed granted remedy available under Section 6409(a) but not Section 332(c)(7). The Commission has ample authority to adopt rules to fix this discrepancy.

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<sup>28</sup> *Id.* ¶ 14.

<sup>29</sup> *City of Arlington*, 668 F.3d at 234 (emphasis added)

<sup>30</sup> See 47 U.S.C. § 332(c)(7)(B)(ii) (“A State or local government or instrumentality thereof *shall* act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time . . . .”) (emphasis added).

<sup>31</sup> *Wireless NPRM/NOI* ¶ 15.

Section 201(b) of the Act gives the Commission broad authority to issue rules where necessary to serve the public interest,<sup>32</sup> and the Supreme Court has confirmed that Section 201(b) empowers the Commission to adopt rules implementing the Act's provisions – including those added via the Telecommunications Act of 1996 (which would include Section 332(c)(7)).<sup>33</sup> Likewise, Section 303(r) of the Act empowers the Commission to implement “such rules and regulations . . . as may be necessary to carry out the provisions of th[e] [Communications Act].”<sup>34</sup>

Finally, Section 253 of the Act, by itself or in tandem with Section 332(c)(7), provides the Commission with authority to adopt a “deemed granted” rule. A State or local government’s failure to act on a siting application within a reasonable period of time has the “effect of prohibiting” telecommunications service, and as such is a sufficient basis for the Commission to impose a “deemed granted” rule to address excessive delays in the permitting process.<sup>35</sup> Indeed, the Commission and courts have recognized that unreasonable delay constitutes a violation of Section 253(a).<sup>36</sup>

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<sup>32</sup> See 47 U.S.C. § 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act].”).

<sup>33</sup> See *Wireless NPRM/NOI* ¶ 15 n.28 (quoting *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999) and *City of Arlington*, 133 S. Ct. at 1866).

<sup>34</sup> 47 U.S.C. § 303(r).

<sup>35</sup> See *Wireless NPRM/NOI* ¶ 15 n.30.

<sup>36</sup> See *Classic Telephone, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 15619, 15634 ¶ 28 (1997) (finding that “a failure by a local government to process a franchise application in due course may ‘have the effect of prohibiting’ the ability of the applicant to provide telecommunications service, in contravention of section 253”); *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441-42 ¶ 105 (1997) (“*TCI Cablevision*”) (noting that “unnecessary delays” caused by local governments are a concern under Section 253); *TCG of New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (“*TCG New York*”).

**D. Any Pre-Application Negotiation Period Should Be Limited to 60 Days.**

As recently noted by Commissioner O’Rielly, “[t]he record is replete with reports of long pre-applications processes before an application can be filed or is deemed complete.”<sup>37</sup> This problem too requires Commission action. Local governments currently have little incentive to complete negotiations within a reasonable period of time, as there is no penalty for stalling negotiations. In one city in a mid-Atlantic State, it took ExteNet three years to successfully negotiate a license agreement, and its negotiation with a large city in the southwest is now three years old and counting. Elsewhere, negotiation periods of a year or more are not uncommon. For example, negotiations with a particular northeastern city lasted approximately 18 months from the time of first contact to final approval of an agreement for public right-of-way access, and the city has imposed six work stoppages to further review small cell use of the public ROW in the three years since that approval. Even under ideal circumstances, pre-application negotiations typically take a minimum of six months.

The Commission should address this by adopting a rule – in tandem with its revised shot clocks and a deemed granted remedy – that would limit all pre-application negotiation periods to 60 days. The 60-day period should commence when either the applicant or the local government makes a written request for negotiations. If not successful by the 60th day, negotiations may terminate and, if the applicant elects, it must be permitted to file its application (which would then be subject to the Commission’s shot clocks). The applicant should also have the option to continue negotiating or to enter into a “safe harbor” license agreement that would permit the

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<sup>37</sup> Michael O’Rielly, Commissioner, FCC, Remarks Before the 2017 Wireless Infrastructure Show, Orlando, FL, at 4 (May 23, 2017) (“O’Rielly Remarks”), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0523/DOC-345021A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0523/DOC-345021A1.pdf) ; see also *Wireless NPRM/NOI* ¶ 20 (requesting comment on when shot clock should run where there are pre-application procedures); *Wireline NPRM/NOI* ¶ 103 (requesting comment on pre-application procedures generally).

applicant to proceed with installation under reasonable terms and conditions. A model safe harbor agreement might be developed through the Commission’s Broadband Development Advisory Committee (“BDAC”), in consultation with industry and State officials.<sup>38</sup>

### **III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING INTERPRETING SECTIONS 253 AND 332 TO ADDRESS DNS DEPLOYMENT BARRIERS.**

Apart from delays, local governments have created other obstacles to DNS deployment – including discriminatory treatment, restrictions unrelated to ROW management, and/or excessive ROW fees. It is critical that the Commission address these problems by issuing a declaratory ruling clarifying the meaning of “prohibit or have the effect of prohibiting” in Section 253(a) and “manage the public rights-of-way” in Section 253(c), so that local governments and DNS providers have a consistent understanding as to what is (and is not) permitted under the Act. The Commission should also clarify the appropriate parameters for public ROW fees under Section 253(c), to provide guidance as to when those fees will be deemed excessive. Lastly, the Commission should confirm that DNS facilities are “functionally equivalent” to other antenna based attachments and should be treated as such under Section 332(c)(7)(B)(i)(I).

#### **A. DNS Providers Face Discriminatory Treatment, Deployment Barriers, and Excessive Fees.**

Delay is not the only serious impediment to DNS deployment. Time and again, DNS providers face discriminatory treatment in comparison to their wireline and utility counterparts; encounter myriad barriers unrelated to ROW management that delay or deter DNS deployments; and are charged excessive and unreasonable fees to deploy in public ROWs.

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<sup>38</sup> The Commission should also foster development of a model siting ordinance, so that pre-application negotiations and other procedures are kept to a minimum.

## **1. Local Governments Discriminate Against DNS Facilities.**

DNS providers are subject to discriminatory treatment by local governments.<sup>39</sup>

ExteNet's survey bears this out: in 2015 and 2016, 49% of the surveyed communities subjected ExteNet to processes and standards that differed from those required of wireline providers and utilities in public ROWs, even though ExteNet's attachments are similarly-sized and impose no greater ROW management burden than their wireline or utility counterparts. Also, 17% of the surveyed communities refused to allow ExteNet to proceed under a standard rights-of-way permitting process, at least in part because ExteNet's facilities use an antenna. Again, this is not a legitimate basis for treating ExteNet's attachments differently than wireline or utility attachments that are the same size or larger.

Perhaps most egregious is the fact that ExteNet's facilities must often go through discretionary, lengthy and burdensome zoning processes, but other non-wireless attachers in the public ROW do not. As noted by the Wireless Infrastructure Association, "[i]t is essentially unheard of for other entities with facilities in the same rights-of-way to be subject to such zoning requirements. Wireline providers and electric companies installing on utility poles are generally either exempted from zoning altogether, or else, they are deemed to be 'permitted uses' in every zone."<sup>40</sup> Crown Castle has described the "real world" impact of such discrimination:

In most jurisdictions, an existing utility, including an incumbent telephone carrier, can place poles in the public right-of-way without any zoning review. Once those poles are installed, an affiliated wireless provider can often attach small wireless facilities – such as small cell nodes – with minimal or no scrutiny, thereby avoiding both the delays and costs experienced by other infrastructure providers. For providers such as Crown Castle that

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<sup>39</sup> See, e.g., *Wireless NPRM/NOI* ¶ 97 (requesting comment on "any State or local regulations that single out telecom-related deployment for more burdensome treatment than non-telecom deployments that have the same or similar impacts on land use").

<sup>40</sup> WIA Public Notice Comments at 10 (citation omitted).

do not provide incumbent, wireline services to end users, however, the experience can be much different. In one central Pennsylvania city, for example, officials recently required Crown Castle to follow the zoning process normally reserved for new macro towers, even though other telecommunications providers only needed to obtain engineering permits. Although Crown Castle was able to obtain a special exemption for half its nodes, the added procedural hurdle resulted in a 3-4 month delay that the incumbent could have avoided.<sup>41</sup>

Discrimination is also manifest in the deployment restrictions local governments impose on DNS providers but not on other occupants of ROW poles. In ExteNet's experience, such restrictions have included (but are not limited to): minimum distances from residential buildings; minimum distances (*e.g.*, 300 or 500 feet) between small cell antennas; arbitrary limitations on equipment dimensions; screening, camouflage and tree planting requirements; submissions of "as-built" plans every year; prohibitions of new facilities within entire zoning classifications; restrictions on proximity to parks, schools and other specific uses; and submissions of a five-year plan to the local government every six months.<sup>42</sup>

ExteNet has been prohibited from constructing new poles solely because it is facilitating provision of wireless service. And, some local governments insist that ExteNet cannot upgrade its facilities or change its equipment without having to go through the entire permit approval process all over again. Other local governments are trying to carve out selected areas within

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<sup>41</sup> Comments of Crown Castle International Corp., WT Docket No. 16-421, at 9 (filed Mar. 8, 2017) ("Crown Castle Public Notice Comments").

<sup>42</sup> See WIA Public Notice Comments at 41-42 ("Repeatedly, WIA members encounter local governments that allow installation of telecommunications and other utility facilities on utility poles in the public rights-of-way subject only to permits that are granted on a ministerial basis, frequently 'over the counter.' Indeed, some cities require no permit whatsoever before installation on existing utility poles. Yet, those same communities refuse to apply the same rules if there is an antenna involved. Rather, when equipment is "wireless" in nature, those communities demand that "wireless" equipment on utility poles in the right-of-way be subject to myriad additional requirements and/or limitations, including discretionary aesthetic zoning permit requirements and limits on the ability to deploy in residential areas.") (citation omitted).

their jurisdictions that would be subject to stricter siting standards for DNS, even where the equipment deployed by ExteNet is the same in all areas.

The Commission correctly observes that “[u]ndergrounding of utility lines seems to place a premium on access to those facilities that remain above ground, such as municipally-owned street lights.”<sup>43</sup> Mandatory undergrounding of utility facilities materially inhibits DNS deployment in two respects. First, DNS deployments are inhibited where local governments prohibit ExteNet from installing new poles in “undergrounded” areas.<sup>44</sup> Second, mandatory undergrounding necessarily leaves DNS providers with fewer locations on which to install their facilities. This, in turn, typically results in substantial increases in the attachment fees local governments charge for access to existing above-ground facilities, which in turn substantially increases the overall cost of DNS deployment.

## **2. Localities Impose Restrictions on DNS Deployments that Have Nothing to Do with ROW Management.**

Many local governments seek to regulate all aspects of wireless deployments under the guise of their residual authority under Section 253(c) to “manage the public rights-of-way.”<sup>45</sup> As discussed in greater detail below,<sup>46</sup> Section 253(c) authority is narrow in scope – it was not intended to be an opening for local governments to regulate all aspects of wireless deployments

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<sup>43</sup> *Wireless NPRM/NOI* ¶ 98.

<sup>44</sup> The Commission should declare that such restrictions “prohibit or have the effect of prohibiting” DNS service in violation of Section 253(a). *See infra* Section III.B.

<sup>45</sup> 47 U.S.C. § 253(c).

<sup>46</sup> *See infra* Section III.C.1.



simply because they will be located in a public ROW – rather, it was intended as a savings clause for Section 253(a).<sup>47</sup> Commissioner O’Rielly described the problem:

[L]ocalities are contemplating such things as network design and performance, including inserting their judgment as to whether a macro or small cell should be used to cover an area; equipment placement; and radiofrequency (RF) exposure issues. I have heard of localities denying applications for infrastructure upgrades, because the provider offers existing service and, therefore, additional facilities are deemed unnecessary. Some even go so far as saying that the infrastructure should be located underground, as if that would ever work for wireless services. Localities should not be making such decisions, and, in fact, they are expressly prohibited, under the law, from basing decisions on RF exposure.<sup>48</sup>

Commissioner O’Rielly’s observations are consistent with ExteNet’s experience. Local governments often slow the permitting process down by micromanaging DNS deployment, inquiring as to matters such as design, coverage and technical need, none of which has anything to do with rights-of-way management.

Some cities also delay the process by insisting that DNS providers seeking right-of-way access demonstrate that they have obtained a certificate of public convenience and necessity (“CPCN”), or equivalent state authorization, to confirm their status as telecommunications providers eligible to access the right-of-way. However, some states (*e.g.*, Pennsylvania and Iowa) are deregulating or pushing to deregulate DNS facilities, rendering them ineligible to obtain CPCNs. This means, in effect, that ExteNet could be denied ROW access where cities treat a CPCN as the only means by which a DNS provider can demonstrate its eligibility as a telecommunications provider. These city-by-city battles over regulatory status create barriers and delays that effectively prohibit deployment and are unrelated to rights-of-way management.

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<sup>47</sup> See Thomas W. Snyder & William Fitzsimmons, *Putting a Price on Dirt: The Need for Better-Defined Limits on Government Fees for Use of the Public Right-of-Way Under Section 253 of the Telecommunications Act of 1996*, 64 Fed. Comm. L. J. 137, 140 (2012).

<sup>48</sup> O’Rielly Remarks at 4 (citation omitted).

The Commission therefore should clarify that it is not the role of local governments to second guess or challenge the regulatory status of every new provider or technology; rather, a DNS provider's right to occupy public rights-of-way under Section 253 (or poles under Section 224) derives from its status as a telecommunications carrier under federal law.<sup>49</sup>

Further, many of the types of restrictions ExteNet has encountered have more to do with aesthetics than ROW management. Screening, camouflage, tree-planting, "minimum distance" and other similar requirements relate to how an installation looks, not whether it poses any physical danger or obstruction in the public ROW. Indeed, aesthetic requirements often are based on entirely subjective criteria (such as whether the proposed installation fits the "character of the neighborhood") rather than objective criteria that can be applied in a consistent manner.

### **3. Localities Charge Arbitrary or Excessive ROW Fees.**

Local governments have demanded that ExteNet pay outrageous fees for access to the public rights-of-way.<sup>50</sup> For example, a city in New York State required a \$30,000 per year flat "administrative fee," plus a payment of \$708 per node per year for each of ExteNet's nearly 60 nodes. A city in the Midwest required ExteNet to pay \$15,000 per year for three DNS nodes. Notably, in approximately 25% of the communities surveyed by ExteNet, the local government

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<sup>49</sup> See 47 U.S.C. § 153(51) (defining "telecommunications carrier" as "any provider of telecommunications services"); *id.* § 153(53) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used"); *id.* § 153(50) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received"). State CPCNs therefore can be a determinant of telecommunications carrier status, but should not be the *only* determinant.

<sup>50</sup> See *Wireline NPRM/NOI* ¶¶ 104-105 (requesting comment on excessive fees and other costs).

required ExteNet to pay fees that were not required of other telecommunications providers who deploy equipment on poles in the public rights-of-way.<sup>51</sup>

ExteNet also has frequently encountered “alternative minimum” provisions that establish an arbitrary floor on what ExteNet will be required to pay, again with no apparent connection to the local government’s costs of managing the public rights-of-way. In some cases, for example, the alternative minimum fee is an arbitrary per-site fee (*e.g.*, \$1,000) or an equally arbitrary fixed amount (*e.g.*, \$50,000), whichever is greater. Fee demands by departments of transportation (“DOTs”) in various states are also a significant problem. ExteNet has encountered a growing number of DOTs that are seeking to charge “macro” tower fees for each DNS node in State rights-of-way. For example, one DOT is demanding \$24,000 per year for one new pole. That same DOT charges the electric utility nothing for its poles.

In addition, ExteNet frequently encounters unreasonable fees for the fiber optic lines that are part of a DNS deployment. Traditionally, fiber optic lines have been relatively easy to deploy because utilities have been putting wires in the public rights-of-way for over one hundred years. Recently, this has changed, especially where the fiber deployment is associated with a wireless facility. Local governments have demanded that ExteNet pay unreasonable and discriminatory fees for fiber optic lines solely because the fiber serves or is associated with wireless equipment.

**B. The FCC Should Clarify the Meaning of “Prohibit or Have the Effect of Prohibiting” in Section 253(a).**

The Commission should clarify the meaning and scope of Section 253(a) of the Act, which states that no State or local regulation or legal requirement “may prohibit or have the

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<sup>51</sup> See also Crown Castle Public Notice Comments at 11-14 (describing excessive ROW fees charged in California, Georgia, Massachusetts, Maryland, New York and Virginia).

effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.”<sup>52</sup> Based on guidance from its own precedent and the courts, the Commission should declare that Section 253(a) is violated by any State or local requirements that: (i) “materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,”<sup>53</sup> or (ii) impede, in combination or as a whole, the provision of any telecommunications service, including but not limited to requirements that leave local governments excessive discretion over applications or impose lengthy or onerous application processes.<sup>54</sup> In so doing, the Commission should clarify that a State or local government requirement need not be “insurmountable” to violate Section 253(a).

**1. Section 253(a) Prohibits Actions that Materially Inhibit Competition or Impede Telecommunications, Including DNS.**

*The California Payphone “materially inhibits” standard.* In *TCI Cablevision*, the Commission expressed concern that some “local governments may be creating an unnecessary ‘third tier’ of regulation that extends far beyond the statutorily protected interests in managing the public rights-of-way.”<sup>55</sup> Quoting its previous decision in *California Payphone*, the Commission held that “[i]n evaluating whether a state or local provision has the impermissible effect of prohibiting an entity’s ability to provide any telecommunications service, we consider whether it ‘materially inhibits or limits the ability of any competitor or potential competitor to

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<sup>52</sup> 47 U.S.C. § 253(a); see *Wireless NPRM/NOI* ¶ 90 (seeking comment on how to interpret the phrase “prohibit or have the effect of prohibiting”).

<sup>53</sup> *California Payphone Ass’n*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206 ¶ 31 (1997) (“*California Payphone*”).

<sup>54</sup> *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001) (“*City of Auburn*”), overruled, *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008) (“*Sprint*”).

<sup>55</sup> *TCI Cablevision*, 12 FCC Rcd at 21440-01 ¶ 102 (citation omitted).

compete in a fair and balanced legal and regulatory environment.”<sup>56</sup> Federal courts subsequently cited *California Payphone*’s “materially inhibits” test favorably in striking down or questioning various kinds of local restrictions on deployment of telecommunications facilities.<sup>57</sup>

***The “City of Auburn” approach.*** Nearly four years after *California Payphone*, the Ninth Circuit provided further guidance in *City of Auburn*:

The preemption [in Section 253(a)] is virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. “Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications.”<sup>58</sup>

The court analyzed a group of local ordinances and franchise agreements, detailing their offending features as follows:

- Applicants “must submit a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items, and ‘[s]uch other and further information as may be requested’”;
- Two of the cities “require a public hearing before granting or revoking a franchise”;
- Each ordinance “authorizes the Cities to consider discretionary factors that have nothing to do with the management or use of the right-of-way”;
- The ordinances “regulate transferability of ownership, even requiring franchises to report [on] stock sales”;
- Some franchise agreements imposed fees that were “not based on the costs of maintaining the right-of-way, as required under the Telecom Act”;
- The “ultimate cudgel is that each city reserves discretion to grant, deny, or revoke the franchises and the Cities may revoke the franchise if the terms in the ordinance are not followed, even allowing the Cities to remove the company’s facilities”; and

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<sup>56</sup> *Id.* at 21439 ¶ 98 (quoting *California Payphone*, 12 FCC Rcd at 14206 ¶ 31).

<sup>57</sup> See, e.g., *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (“*Puerto Rico Telephone*”); *TCG New York*, 305 F.3d at 76.

<sup>58</sup> *City of Auburn*, 260 F.3d at 1175 (quoting *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998) (“*City of Dallas*”) (subsequent history omitted)).

- “Civil and criminal penalties are authorized as well.”<sup>59</sup>

The court concluded that “[t]aken together, these requirements ‘have the effect of prohibiting’ Qwest and other companies from providing telecommunications services and create a substantial and unlawful barrier to entry into and participation in the . . . Cities’ telecommunications markets.”<sup>60</sup> The court emphasized that its conclusion was “based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone.”<sup>61</sup>

The Ninth Circuit’s reading of 253(a) in *City of Auburn* was adopted and cited approvingly by other circuit courts,<sup>62</sup> but not the Eighth Circuit.<sup>63</sup> Ultimately, an *en banc* panel of the Ninth Circuit overruled *City of Auburn*, stating it joined “the Eighth Circuit in holding that ‘a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.’”<sup>64</sup> The *Sprint* panel, however, went even further – it held that a challenge under Section 253(a) “‘must establish that no set of circumstances exists under which the [challenged regulation] would be valid.’”<sup>65</sup>

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<sup>59</sup> *City of Auburn*, 260 F.3d at 1176 (emphasis added).

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> *Id.* at 1176 n.11.

<sup>62</sup> See, e.g., *TCG New York*, 305 F.3d at 76; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (“*City of Santa Fe*”); *Puerto Rico Telephone*, 450 F.3d at 18 (relying on *TCG New York* and *City of Santa Fe* for scope of Section 253(a) prohibition); *New Jersey Payphone Ass’n Inc. v. Town of West New York*, 299 F.3d 235, 247 (3d Cir. 2002) (“*New Jersey Payphone*”) (declining to rule on franchise selection criteria but noting “that several of the criteria which the Town would apply have been rejected in connection with non-exclusive franchise schemes considered by other jurisdictions”) (citing *City of Auburn*).

<sup>63</sup> *Level 3 Communications v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007).

<sup>64</sup> *Sprint*, 543 F.3d at 578 (quoting *Level 3*, 477 F.3d at 532-33).

<sup>65</sup> *Id.* at 579 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The FCC should reject the *Sprint* “no set of circumstances” standard, which would allow many local regulations that “materially inhibit[] or limit[] the ability” of a provider “to compete in a fair and balanced legal and regulatory environment” to nonetheless survive a Section 253 challenge. Such regulations could, theoretically, be upheld as long as the provider could nominally enter the market, albeit hindered by the regulations at issue. Likewise, a provider who could show that a local regulation interferes with its ability to compete may not be able to demonstrate that there is no set of circumstances under which the regulation is valid.

Simply put, the Ninth Circuit’s decision in *Sprint* has flipped the intent of Congress on its head. It gives local governments wide latitude to impose all manner of barriers to deployment. So long as they do not prohibit telecommunications service under all possible circumstances, local governments are permitted to act as gatekeepers to competition, imposing regulations that skew the market against new technologies. This is impossible to square with the pro-competitive objectives of Section 253 and the Telecommunications Act of 1996 (“1996 Act”).

Furthermore, the Commission has never adopted the “no set of circumstances” test approved in *Sprint*. For example, in *State of Minnesota*, the Commission held that an agreement in which the State of Minnesota granted a developer exclusive physical access to rights-of-way along the state’s interstate highways was not consistent with Section 253(a).<sup>66</sup> The Commission stated that the existence of alternative rights-of-way did not mean that the challenged agreement “[did] not have the potential to prevent certain carriers from providing facilities based

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<sup>66</sup> *The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of Way*, 14 FCC Rcd 21697 (1999) (“*State of Minnesota*”).

services.”<sup>67</sup> In other words, the Commission did not require a showing that the challenged agreement would be impermissible under all circumstances.

The Commission therefore should declare that the test articulated in *City of Auburn* is correct, and reject the *Sprint* approach.

***Both California Payphone and City of Auburn should inform the 253(a) standard.*** The Commission should apply both the *California Payphone* “materially inhibits” test and the *City of Auburn* approach when determining whether a State or local restriction on deployment prohibits or has the effect of prohibiting telecommunications and therefore violates Section 253(a). Such a dual-pronged standard is necessary to ensure that a broad range of State and local restrictions on deployment are covered, consistent with the purpose of the Act.<sup>68</sup>

For further clarity, and consistent with decisions issued by the First, Second and Tenth Circuits, the Commission should declare that a State or local regulation will be preempted under Section 253(a) if “it *may* have the effect of prohibiting the ability of an entity to provide telecommunications service.”<sup>69</sup> That is, a Section 253(a) claimant may succeed if it can show that a regulation presents the possibility of an effective prohibition. Section 253(a) is at best ambiguous on this issue, and the Commission has broad discretion to interpret the statute in a manner that is consistent with the statute’s purpose and Congressional intent. As discussed above, the Commission, in its *California Payphone* decision, has exercised its authority to interpret what “have the effect of prohibiting” means in Section 253(a).<sup>70</sup> Courts have given

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<sup>67</sup> *Id.* at 21709 ¶ 23.

<sup>68</sup> *Id.* at 21707 ¶ 18 (“[S]ection 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services.”).

<sup>69</sup> *Wireless NPRM/NOI* ¶ 91.

<sup>70</sup> *See California Payphone*, 12 FCC Rcd at 14206 ¶ 31, 14209 ¶ 38.



deference to the FCC's interpretations of ambiguous terms in Sections 253.<sup>71</sup> In this case, the Commission can best effectuate Congressional intent by recognizing that some regulations may have a chilling effect on deployment even where they only have the potential to effectively prohibit service.<sup>72</sup>

**2. The Section 253(a) Standard Is Not the Same as the Judge-Made Section 332(c)(7) Standard, Which Should Not Apply to DNS Deployments.**

The Commission should declare that the analysis of what constitutes an “effective prohibition” under Section 253(a) is not the same as the judicially created analysis of that term in Section 332(c)(7)(B)(i)(II).<sup>73</sup> The Commission should also make it clear that the Section 253(a) analysis, not the Section 332(c)(7)(B)(i)(II) analysis, should be applied to DNS facilities.<sup>74</sup>

As an initial matter, although both Section 253(a) and Section 332(c)(7) govern deployment of DNS facilities, Section 253(a) applies more broadly to regulations, whereas Section 332(c)(7) applies to siting decisions.<sup>75</sup> To establish an “effective prohibition” under Section 332(c)(7)(B)(i)(II), courts have required applicants to demonstrate that they “need” a site

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<sup>71</sup> See, e.g., *TCG New York*, 305 F.3d at 76 (“[T]he FCC’s decisions interpreting the scope of § 253(c) merit some deference.”); *id.* (“We agree with [FCC] precedent[]” in the *California Payphone* decision interpreting Section 253(a).); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.11 (6th Cir. 2001) (“As the federal agency charged with implementing the Act, the FCC’s views on the interpretation of Section 253 warrant respect.”).

<sup>72</sup> *State of Minnesota*, 14 FCC Rcd at 21708 ¶ 20 (“Minnesota fails to show that the Agreement *does not have the potential* to violate section 253(a).”) (emphasis added).

<sup>73</sup> Section 332(c)(7)(B)(i)(II) states: “The regulation of the placement, construction and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless service.” 47 U.S.C. § 332(c)(7)(B)(i)(II).

<sup>74</sup> See *Wireless NPRM/NOI* ¶ 91 (discussing application of “significant gap/alternative site” test by various courts).

<sup>75</sup> *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F.Supp 2d 1272, 1277 (S.D. Cal. 2002).

to fill a “significant gap” in coverage, and to demonstrate the lack of alternative sites.<sup>76</sup>

Increasingly, local governments are requiring ExteNet to show that its proposed DNS facilities will close a “significant gap” in wireless service, and that ExteNet’s DNS network is the “least intrusive” or even the only feasible site available to it. Such requirements are inappropriate for several reasons.

First, the “significant gap/alternative sites” analysis ignores the fact that ExteNet’s DNS service is separate and apart from the retail service its wireless carrier customers provide to their subscribers. ExteNet has an independent right under Section 253(a) to provide telecommunications service, regardless of whether its wireless carrier customers are closing a “significant gap” in coverage. As noted by Verizon and others in response to the *Wireless Streamlining Public Notice*, the “significant gap/alternative sites” test was created by judges in “tall tower” cases, and as such is meaningless and obsolete in the context of DNS facilities.<sup>77</sup>

Further, application of a needs-based analysis on DNS facilities would effectively make local governments the arbiters of whether new technologies may be deployed in the marketplace. But, Section 157(a) of the Act provides that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public,” and any person or party who opposes a new technology or service “shall have the burden to demonstrate that such proposal is inconsistent with the public interest.”<sup>78</sup> The judicial interpretation of Section 332(c)(7)(B)(i)(II), which suggests that a provider cannot install facilities unless it can

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<sup>76</sup> See, e.g., *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009) (“When a carrier claims an individual denial is an effective prohibition [under Section 332(c)(7)(B)(i)(II)], virtually all circuits require courts to (1) find a ‘significant gap’ in coverage exists in an area and (2) consider whether alternatives to the carrier’s proposed solution to that gap mean that there is no effective prohibition.”) (citations omitted)).

<sup>77</sup> See, e.g., Verizon Public Notice Comments at 20-22.

<sup>78</sup> 47 U.S.C. § 157(a).

demonstrate an absolute need, reverses Section 157(a)'s burden of proof by shifting it from the local government to providers like ExteNet.

Consideration of “alternatives” has been rejected by the Commission in the context of Section 253. As discussed above, in *State of Minnesota* the Commission explicitly rejected the argument that the availability of alternative ROWs (*i.e.*, theoretically feasible alternatives) meant that the State requirement at issue did not effectively prohibit service in violation of Section 253(a).<sup>79</sup> In any case, a standard that would require ExteNet and other DNS providers to demonstrate that there are no alternatives makes no sense when applied to public rights-of-way, given that public ROWs are often the *only* reasonable means through which DNS facilities may be deployed.

### **3. The Section 253(a) Standard Prohibits Excessive Discretion and Onerous Application Requirements.**

The Commission should declare that any application process that gives a State or local government excessive discretion over whether to grant or deny a DNS permit application “prohibit[s] or [has] the effect of prohibiting” telecommunications service under Section 253(a). Congress carved out only a limited role for State and local regulation of telecommunications facilities in Section 253(c). Had it intended to give State and local governments absolute discretion over when and where telecommunications facilities may be deployed, it would have done so. Yet, ExteNet is routinely forced to go through local zoning processes that invariably give the local government authority to delay the process and/or deny a DNS permit application

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<sup>79</sup> *State of Minnesota*, 14 FCC Rcd at 21709 ¶ 23.

for virtually any reason. This problem will continue to plague DNS deployments unless the Commission says that it will no longer be tolerated.<sup>80</sup>

Onerous application requirements also can “prohibit or have the effect of prohibiting” DNS service.<sup>81</sup> Particularly during formal zoning, it is not unusual for a local government to ask for voluminous amounts of information and to randomly declare that applications are incomplete. The application process becomes an endless exchange of paperwork, with applications often having to be resubmitted multiple times before they are considered for grant. This provides applicants with no certainty as to how long application processing will take, and inevitably results in additional costs and delays that have the effect of prohibiting telecommunications service.<sup>82</sup>

#### **4. The Section 253(a) Standard Does Not Require a Showing of Insurmountability.**

The Commission should declare that the phrase “prohibit or have the effect of prohibiting” does not require an applicant to demonstrate that a given regulation is

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<sup>80</sup> See *TCG of New York*, 305 F.3d at 81 (“[T]he Ordinance’s provisions allowing the White Plains Common Council to consider any factor deemed to be in the public interest provides precisely the sort of discretion to prohibit telecommunications services that § 253 preempts.”) (citation omitted); *Bell Atl. v. Prince Georges County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999) (“*Bell Atlantic-Maryland*”), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000) (“[A]ny ‘process for entry’ that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decision makers to grant or deny permission to use the public rights-of-way ‘may . . . have the effect of prohibiting’ the provision of telecommunications services in violation of the [Act].”).

<sup>81</sup> See, e.g., *TCG of New York*, 305 F.3d at 81 (striking down an ordinance that required disclosures about the telecommunications services to be provided, the sources of financing for the telecommunications services, and the applicant’s qualifications to receive a franchise).

<sup>82</sup> For examples of local application processes run amok, see the case studies submitted by ExteNet in its comments on the *Wireless Streamlining Public Notice*. ExteNet Public Notice Comments at 11-17.

insurmountable. Courts have found that a showing of insurmountability is not required.<sup>83</sup>

Likewise, the Commission has focused on the impact a regulation or restriction has on market entry, not on whether that regulation or restriction could never be overcome.<sup>84</sup> Were the Commission to require a showing of insurmountability, an applicant could never win a Section 253(a) case unless a State or local government imposed an absolute ban on telecommunications service. Since such absolute bans are rare, an insurmountability requirement would effectively nullify Section 253(a).

Local government comments in response to the *Wireless Streamlining Public Notice* highlight the problem. Some local governments have argued that there can be no finding of an effective prohibition under Section 253(a) since DNS facilities have already been deployed “across the country.”<sup>85</sup> This argument misses the point and effectively converts the broad protections of Section 253(a) into the more narrow protections of Section 332(c)(7). The fact that DNS facilities were constructed at some point does not address how long construction took, the terms and conditions that the provider had to accept, how many proposals were rejected, or how many locations were never even applied for because of known local impediments. Nor does it address how many small wireless facilities could have been deployed were it not for the significant barriers chronicled in the WT Docket No. 16-421 record. Thus, a local government cannot point to existing DNS installations as a defense to a Section 253(a) claim.

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<sup>83</sup> See *Puerto Rico Telephone*, 450 F.3d at 18 (“Courts have also noted that ‘a prohibition does not need to be complete or ‘insurmountable’ to run afoul of §253(a).’”) (citations omitted); *TCG New York*, 305 F.3d at 76; *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000).

<sup>84</sup> See, e.g., *State of Minnesota*, 14 FCC Rcd at 21707 ¶ 19 (“[W]e will look at the effect of the state or local government’s action to determine whether Section 253 is applicable.”).

<sup>85</sup> Comments of Smart Communities Siting Coalition, WT Docket No. 16-421, at 55 (filed Mar. 8, 2017) (“Siting Coalition Public Notice Comments”).

**5. Any Commission Actions Taken in These Proceedings Should Supersede Existing Franchises, Licenses and Similar ROW Access Agreements.**

To give full effect to any actions it may take in connection with the *Wireless NPRM/NOI* and *Wireline NPRM/NOI*, the Commission should declare that such actions supersede contrary provisions in existing franchises, licenses and similar agreements for public ROW access, and give the parties a brief period in which to formally revise those agreements in order to comply with the new rules or policies. Many of these agreements are long-term arrangements that may have years to run, so the impact of any Commission actions will be muted if contrary provisions are not superseded or required to be amended upon the effective date of any new Commission rules or policies adopted in these proceedings. Furthermore, application of any new Commission rules or policies to existing ROW agreements would not be impermissibly retroactive, as it would merely alter the present situation, not “the past legal consequences of past actions.”<sup>86</sup> As noted by the D.C. Circuit, an agency order that only “upsets expectations based on prior law is not retroactive.”<sup>87</sup>

**C. The FCC Should Clarify the Meaning of “Manage the Public Rights-of-way” in Section 253(c).**

The Commission should confirm that in Section 253(c) Congress intended to preserve for local governments a limited and narrow management role – focused on physical occupation – in regulating the public rights-of-way. Local requirements that are not reasonable management of the public rights-of-way and impede DNS deployments should be prohibited.

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<sup>86</sup> *Mobile Relay Assocs.*, 457 F3d 1, 11 (D.C. Cir. 2006)

<sup>87</sup> *Id.*

### 1. ROW Management Authority under Section 253(c) Is Limited.

Section 253 must be analyzed with the understanding of the limited role that Congress intended for local governments, particularly under Section 253(c). Structurally, subsection (a) broadly declares the general rule that no State or local regulation or requirement may “prohibit or have the effect of prohibiting” the ability of “any entity” to provide telecommunications.<sup>88</sup> Then, under subsection (c), the statute allows States and local governments “to manage the public rights-of-way” and “to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”<sup>89</sup>

The Commission and courts have read these subsections together to define the limits of local regulatory authority over telecommunications providers. Thus, local governments are preempted from regulating unless the requirement falls within the authority reserved in Section 253(c) or delegated to the States in Section 253(b).<sup>90</sup> As the First Circuit has explained, “[S]tates may regulate *broadly* [under Section 253(b)] with respect to public safety and welfare, service quality, and consumer protection, while *local governments*, in addition to any powers specifically delegated by the [S]tate, have *narrower* residual authority to manage and demand compensation for the use of their rights-of-way.”<sup>91</sup>

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<sup>88</sup> 47 U.S.C. § 253(a).

<sup>89</sup> *Id.* § 253(c).

<sup>90</sup> Under Section 253(b), States are allowed to “impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” *Id.* § 253(b).

<sup>91</sup> *Cablevision of Boston, Inc. v. Pub. Improvement Comm’n*, 184 F.3d 88, 98 (1st Cir. 1999) (“*Cablevision of Boston*”) (emphasis added).

Consistent with its precedent, the Commission should make clear that the narrow management role provided under Section 253(c) limits local governments to traditional safety and construction coordination functions. The Commission addressed this point in *TCI*

*Cablevision*:

We recognize that section 253(c) preserves the authority of [S]tate and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. We previously described the types of activities that fall within the sphere of appropriate rights-of-way management . . . . These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.<sup>92</sup>

The legislative history of Section 253(c) supports the Commission's above-quoted reading of the statute. During the floor debate on Section 253(c), Senator Diane Feinstein offered examples of the types of restrictions that the Congress intended to permit, including requirements that:

- Regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;
- Require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;
- Require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;
- Enforce local zoning regulations; and

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<sup>92</sup> *TCI Cablevision*, 12 FCC Rcd at 21441 ¶ 103 (citation omitted).



- Require a company to indemnify the City against any claims of injury arising from the company's excavation.<sup>93</sup>

Section 253(c) thus preserves only a narrow role for local governments in overseeing use public ROWs, and the phrase “manage the public rights-of-way” is not an opening for local governments to regulate all aspects of wireless deployments simply because they will be located in a public ROW. The Commission should confirm that local ROW management only includes those tasks necessary to protect the health, safety and welfare of the public – it means “control over the right-of-way itself, not control over companies with facilities in the right-of-way.”<sup>94</sup>

## 2. Local Regulations that Are Not Related to ROW Management and Inhibit DNS Deployments Should Be Prohibited.

The Commission should clarify that local government ROW restrictions beyond those enumerated in *TCI Cablevision* are not eligible for the ROW management exception in Section 253(c).<sup>95</sup> This means, for example, that attempts to regulate the network design, coverage, and technology of DNS deployments in the public ROW should be prohibited. Similarly, inquiries as to an applicant's finances, ownership or regulatory status should not be permitted. The Commission should re-emphasize that restrictions based on RF emissions are prohibited as well.<sup>96</sup>

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<sup>93</sup> *XO Mo., Inc. v. City of Md. Heights*, 256 F. Supp. 2d 987, 995-96 (E.D. Mo. 2003) (“*XO Missouri*”) (quoting *Classic Telephone*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103 ¶ 39 (1996) (“*Classic Telephone*”), quoting 141 Cong.Rec. S8172 (daily ed. June 12, 1995)). See also *City of Auburn*, 260 F.3d at 1177-78.

<sup>94</sup> *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 484 (N.D.N.Y. 2003).

<sup>95</sup> See *Wireline NPRM/NOI* ¶ 106 (requesting comment on “right-of-way conditions that inhibit the deployment of broadband by forcing broadband providers to expend resources on costs not related to rights-of-way management”).

<sup>96</sup> See 47 U.S.C. § 332(c)(7)(B)(iv) (“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.”). Local

Likewise, the Commission should declare that consideration of aesthetics with respect to public ROW deployments, when not based on objective standards applied consistently to all ROW occupants, exceeds the limited ROW management role afforded localities under Section 253(c) and are prohibited.<sup>97</sup> First and foremost, aesthetic restrictions are discriminatory unless they are imposed on all ROW occupants, particularly where, as here, a DNS provider's attachments impose no greater burden on the public ROW than wireline or utility attachments. Second, too often aesthetic restrictions are based on vague, subjective standards (*e.g.*, "character of the neighborhood") that give DNS providers no guidance as to what is aesthetically satisfactory (and provide local governments with substantial latitude to deny permit applications on aesthetic grounds). To provide more clarity, the Commission should declare that State or local restrictions based aesthetics are not permitted unless they are imposed on all ROW occupants and based on measurable, *objective* standards that can be readily understood, such as size of equipment (using the Commission's volumetric safe harbor), placement on the pole and painting requirements.

**D. The FCC Should Clarify that Requirements Imposed on DNS but Not Other ROW Users Violate Section 253(a) and Are Not Saved by Section 253(c).**

The Commission should declare that State or local restrictions that are imposed on DNS providers but not other public ROW users are discriminatory, violate Section 253(a) and are not "saved" by Section 253(c).

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governments attempt to circumvent this restriction by imposing RF testing and/or reporting requirements on DNS providers. In one case, for instance, ExteNet was required to test its facilities for RF emissions every two years. This sort of "end run" around Section 332(c)(7)(B)(iv)'s prohibition of local regulation of RF emissions should not be permitted, since RF safety matters are already regulated by the Commission and do not fall within the scope of rights-of-way management outlined in *TCI Cablevision*.

<sup>97</sup> See *Wireless NPRM/NOI* ¶ 92 & n.180 (noting that while "use of aesthetic considerations is not inherently improper," aesthetic restrictions cannot be based on "generalized concerns").

As discussed above,<sup>98</sup> ExteNet is subject to discriminatory local requirements and restrictions that have substantially impeded its ability to provide telecommunications service. Although the word “nondiscriminatory” does not appear in Section 253(a), it is clear that the discrimination such as that described by ExteNet “prohibit[s] or [has] the effect of prohibiting” telecommunications service, in that it “materially inhibits or limits” the ability of DNS providers like ExteNet to “compete in a fair and balanced legal and regulatory environment,” per the standard in *California Payphone*.<sup>99</sup>

Discriminatory regulation also cannot be reconciled with the pro-competitive intent behind Section 253:

Section 253 is a critical component of Congress’ pro-competitive deregulatory national framework that it put into place by enacting the 1996 Act. As we have noted, “Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.”<sup>100</sup>

It is equally clear that discriminatory regulations at the State or local level cannot be “saved” by Section 253(c), given its requirement that ROW management be nondiscriminatory:

One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. *Local requirements imposed only on the operations of new entrants and not on existing*

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<sup>98</sup> See *supra* Section III.A.1.

<sup>99</sup> *California Payphone*, 12 FCC Rcd at 14206 ¶ 31.

<sup>100</sup> *TCI Cablevision*, 12 FCC Rcd at 21440 ¶ 102 (quoting *Classic Telephone*, 11 FCC Rcd at 13096 ¶ 25).

*operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.*<sup>101</sup>

Accordingly, to eliminate any doubt about the matter, the Commission should declare that State or local restrictions that are imposed on DNS providers but not on other public ROW users are discriminatory, contrary to Section 253(a) and Section 253(c).

Thus, for example, the Commission should not permit restrictions on deployment of new poles or on pole spacing in residential areas unless those restrictions are imposed on all pole owners. The imposition of a formal zoning process on a DNS provider but not on other public ROW users would be subject to preemption on two independent grounds: (i) the zoning process could be preempted as being excessively burdensome and therefore having the effect of prohibiting telecommunications service, and (ii) the zoning process could be preempted as being discriminatory and therefore having the effect of prohibiting telecommunications service.

Lastly, Section 332(c)(7)(B)(i)(I) provides an independent basis to prohibit discriminatory treatment of DNS deployments on existing poles. That statute prohibits States and local governments from unreasonably discriminating among providers of “functionally equivalent services.”<sup>102</sup> At a minimum, DNS facilities are “functionally equivalent” to those of any other pole user that installs an antenna, such as a local government or utility. The Commission should declare that State or local governments that impose limits, requirements or

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<sup>101</sup> *TCI Cablevision*, 12 FCC Rcd at 21443 ¶ 108 (emphasis added) (citation omitted). The Commission has found, and the Third and Tenth Circuits have affirmed, that Section 253(c)’s statutory requirements to “apply to both compensation regulations *and to the management of rights-of-way.*” *City of Santa Fe*, 380 F.3d at 1272 (emphasis added) (citing *Classic Telephone* 11 FCC Rcd at 13103). *See also New Jersey Payphone*, 299 F.3d at 245-46 (“[I]n looking at the statutory language in context, we find that the more logical reading of Section 253(c) requires management of public rights-of-way to be competitively neutral and nondiscriminatory.”). *But see Cablevision of Boston*, 184 F.3d at 101-02 (suggesting a narrower interpretation).

<sup>102</sup> *See Wireless NPRM/NOI* ¶ 99 (quoting 47 U.S.C. § 332(c)(7)(B)(i)(I)).

fees on DNS providers but not on other antenna-based pole users are in violation of Section 332(c)(7)(B)(i)(I)'s anti-discrimination requirement and are subject to preemption.

**E. The FCC Should Address Arbitrary and Excessive ROW Fees.**

The Commission should further declare that, consistent with Section 253(c), local government fees for the use of the public rights-of-way by DNS facilities (including fiber optic lines): (i) must not exceed the direct costs incurred by the local government in managing the provider's use of the public rights-of-way; (ii) may not be greater than fees charged to other users of the public rights-of-way; and (iii) must be publicly disclosed in advance.

**1. The FCC Should Declare that ROW Fees Charged to a DNS Provider May Not Exceed a Locality's Direct Management Costs.**

Consistent with the approach taken by a number of courts, the Commission should declare that Section 253(c)'s requirement that public ROW fees be "fair and reasonable" allows local governments to recover only their direct costs of managing the use of public rights-of-way.<sup>103</sup> For example, in *Bell Atlantic-Maryland*, a federal district court rejected a county's attempt to impose a "right-of-way charge" equal to 3% of a rights-of-way user's gross revenue. In so doing, the court held that "the proper benchmark is the cost to the [c]ounty of maintaining and improving the rights-of-way that [the carrier] actually uses."<sup>104</sup> In *XO Missouri*, another federal district court similarly rejected a licensee fee partially based on revenue: "[A] fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way."<sup>105</sup> In *City of Dallas*, the City attempted to charge AT&T a franchise fee equal to 4% of its gross receipts for television

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<sup>103</sup> See *Wireline NPRM/NOI* ¶ 105 (requesting comment on how the Commission should define what constitutes "excessive" fees).

<sup>104</sup> *Bell Atlantic-Maryland*, 49 F.Supp at 818.

<sup>105</sup> *XO Missouri*, 256 F. Supp. 2d at 994.

operations. The court found that this fee was “in no way tied to AT&T’s use of City rights-of-way,”<sup>106</sup> and that “any fee that is not based on AT&T’s use of City rights-of-way violates [Section] 253(a) of the [1996 Act] as an economic barrier to entry.”<sup>107</sup>

As noted above, local governments have been demanding fees that bear no relationship to their costs of managing a provider’s use of the public ROW.<sup>108</sup> In fact, the comments filed by local governments in response to the *Wireless Streamlining Public Notice* demonstrate that many localities consider small wireless network deployment to be a means of generating revenue. New York City, for instance, views its regulatory authority over deployment as an opportunity to conduct “a form of hybrid competitive process” – an auction – for permission to use existing utility poles.<sup>109</sup> Likewise, jurisdictions in Texas contend that cities are required “to act as landlords, rather than regulators,”<sup>110</sup> and should be allowed to set their prices like private landlords.<sup>111</sup> In Georgia, municipalities seek to charge “fair market value,” defined as “what it would cost the user . . . to purchase access from a private property owner.”<sup>112</sup> The Siting Coalition goes so far as to say that *any* FCC regulation of the prices local governments charge

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<sup>106</sup> *City of Dallas*, 8 F.Supp 2d at 588.

<sup>107</sup> *Id.* at 593. *See also Puerto Rico Telephone*, 450 F.3d at 22 (“We agree with the district court’s reasoning that fees should be at the very least, related to the actual use of rights of way and that ‘the cost [of maintaining those rights of way] are an essential part of the equation.’”) (quoting *P.R. Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 113-114 (D.P.R. 2005)). *But see TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (approving a 4% gross revenue fee, holding that lower court properly reviewed the extent of the use contemplated and the amount other telecommunications providers would be willing to pay).

<sup>108</sup> *See supra* Section III.A.3.

<sup>109</sup> Comments of the City of New York, WT Docket No. 16-421, at 4 (filed Mar. 8, 2017).

<sup>110</sup> Comments of the City of Austin, Texas, WT Docket No. 16-421, at 8 (filed Mar. 8, 2017).

<sup>111</sup> *See, e.g.,* Comments of the Cities of San Antonio, et al., WT Docket No. 16-421, at 26-27 (filed Mar. 8, 2017).

<sup>112</sup> Comments of the Georgia Municipal Association, Inc., WT Docket No. 16-421, at 5 (filed Feb. 28, 2017).

small wireless networks “is bad policy,” building an argument on the idea that the public rights-of-way are no different than any form of property.<sup>113</sup>

These assertions all share a common fallacy, namely that local government stewardship of public ROWs is akin to private property ownership. But this is not the case – local governments hold the public rights-of-way in trust for the public. Early on, the New York Supreme Court explained that:

The city corporation, as fee holder of the streets, in trust, for public use as highways, is but an agent of the State. Any control which it exercises over them . . . is a mere police or government power delegated by the State.<sup>114</sup>

As the Supreme Court of Illinois put it:

Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public.<sup>115</sup>

Other courts have agreed.<sup>116</sup> Indeed, the Commission itself has previously considered and rejected local government claims of proprietary interests: “Courts have held that municipalities generally do not have a compensable ‘ownership’ interest in public rights-of-way,

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<sup>113</sup> Siting Coalition Public Notice Comments at 37.

<sup>114</sup> *People v. Kerr*, 27 N.Y. 188, 213 (1863).

<sup>115</sup> *AT&T v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993).

<sup>116</sup> See, e.g., *City of Mission v. Popplewell*, 294 S.W.2d 712, 715 (Tex. 1956) (“The city controls the streets as trustee for the public. It has no proprietary title nor right to exclusive possession,” and “courts everywhere decline to recognize that the city possesses any property rights in the streets.”); *Texas Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644-45 (Tex. 2004) (“even though legal title was taken in the county’s name, title was held for the benefit of the State and the general public”); *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at \*16-18 (S.D.N.Y. Dec. 10, 2004) (holding that City’s requirements and fees for use of city-owned poles “are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy”); *Mayor and City Council of Baltimore v. United States*, 147 F.2d 786, 788-89 (4th Cir. 1945) (County “is not entitled to compensation as if it were the owner of an unqualified interest in the land”).

but rather hold the public streets and sidewalks in trust for the public.”<sup>117</sup> The Commission therefore should confirm that local governments are acting as regulators, not proprietors, when they charge DNS providers a fee for using public ROWs or otherwise regulate usage of public ROWs.<sup>118</sup> And as regulators, their recovery of ROW management costs must be cost-based.

Further, to eliminate any further doubt about this issue and provide DNS providers with some badly needed certainty as to what they must pay for ROW usage, the Commission should follow the court decisions described above and further declare that a local government may not impose a rights-of-way fee that exceeds the local government’s direct cost of managing a DNS provider’s use of the public ROW. Such a declaration will speed DNS deployment by putting local governments on notice as to what fees are permitted (thus minimizing the potential for disputes), while still allowing them to recover their costs of managing public ROWs.

To minimize the potential abuse of the cost-based approach, the Commission should impose reasonable limits on what costs are recoverable. Such recoverable costs should include upkeep, maintenance, inspections and application processing.

## **2. ROW Fees Must Be Competitively Neutral and Nondiscriminatory.**

The Commission should also find that Section 253(c)’s mandate that public ROW fees be “competitively neutral and nondiscriminatory” is not satisfied where DNS providers are required

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<sup>117</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5160 ¶ 134 (2007) (citations omitted).

<sup>118</sup> *See Zayo Group, LLC v. Mayor and City Council of Baltimore*, 2016 U.S. Dist. LEXIS 77700, \*15 n.6 (D. Md. June 14, 2016) (holding that City’s conduit fee “is governmental in nature, and thus, falls within the boundaries of the [1996 Act]”); *see also Wireless NPRM/NOI* ¶ 96 (seeking comment on how to distinguish between “State and local governments’ regulatory roles versus their proprietary roles as ‘owners’ of public resources”).



to pay fees not imposed on other users of the public ROW.<sup>119</sup> For example, if wireline telecommunications service providers pay nothing but a one-time permit fee, DNS providers should not pay annual fees, higher application fees, or fees based on factors other than those used to set fees for wireline providers. Too often, this is not the case – as shown above, ExteNet is paying fees not required of other ROW occupants.<sup>120</sup> The Commission should make it clear that this is not permissible.

### **3. ROW Fees Must Be Publicly Disclosed.**

The Commission should declare that all fees for use of the public ROWs (including any increases or decreases of those fees in subsequent years) must be publicly disclosed in advance, or at a minimum disclosed in advance upon request. Notwithstanding Section 253(c)'s requirement that ROW management fees be both “competitively neutral and nondiscriminatory” and “publicly disclosed,”<sup>121</sup> in some cases ExteNet has had difficulty obtaining advance notice of the fees it is required to pay. In other cases, fees are offered only as an initial rate that could be increased to undisclosed levels in the future. A Commission declaration is necessary to conform local disclosure practices to the plain language of the statute. The Commission should also specify a remedy available to DNS providers where fees are not publicly disclosed. Such a remedy might include, for example, a default to the lowest fee for ROW occupancy charged to any regulated utility for substantially similar placement of facilities.

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<sup>119</sup> See *TCG of New York*, 305 F.3d at 80 (“[F]ees that exempt one competitor are inherently not ‘competitively neutral,’ regardless of how that competitor uses its resulting market advantage.”) (quoting 47 U.S.C. § 253(c)).

<sup>120</sup> See *supra* Section III.A.3.

<sup>121</sup> 47 U.S.C. § 253(c).

**F. The FCC Has the Legal Authority to Clarify by Declaratory Ruling the Types of Conduct Prohibited Under Sections 253 and 332(c)(7).**

The Commission has more than adequate authority to issue a declaratory ruling that provides guidance as to the meaning of provisions in Section 253 and 332(c)(7). Section 1.2(a) of the Commission's rules states that "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."<sup>122</sup> Section 1.2(a) is "derivative of" Section 554(e), which likewise states that "[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."<sup>123</sup> Further, declaratory rulings are informal adjudications under the Administrative Procedure Act ("APA"),<sup>124</sup> and the Commission has very broad discretion when choosing whether to proceed via rulemaking or adjudication.<sup>125</sup>

The issues raised above with respect to Section 253(a) and 253(c) are precisely the types of issues that should be clarified via declaratory ruling. Declaratory rulings provide interested parties with guidance as to their obligations under the Act or the Commission's Rules, and they are especially warranted where conflicting interpretations or other factors have created uncertainty. That is the case here. For example, the phrase "prohibit or have the effect of prohibiting" in Section 253(a) requires clarification because it is undefined in the statute and subject to conflicting interpretations between the Ninth Circuit and other circuits. The terms "manage the public rights-of-way" and "fair and reasonable" in Section 253(c) are undefined as

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<sup>122</sup> 47 C.F.R. § 1.2(a).

<sup>123</sup> *City of Arlington*, 668 F.3d at 241 (quoting 5 U.S.C. § 554(e)).

<sup>124</sup> *Id.* at 240-41.

<sup>125</sup> *Id.* at 240 (quoting *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001) ("Agencies typically enjoy 'very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking.'")).

well. Other matters raised above either require Commission clarification (*e.g.*, the role of aesthetics in the permitting process or discriminatory permitting practices by local governments) or reinforcement (*e.g.*, public disclosure of fees) to eliminate barriers to DNS deployment.

A declaratory ruling also is the most efficient and effective way to proceed. DNS deployments already have been delayed significantly under the existing Section 253 framework, and the delays will continue if DNS providers must wait for the Commission to conduct a rulemaking about the meaning of the statute. Meanwhile, consumer demand for advanced wireless services will continue to grow, but DNS providers will be stuck in a regulatory “no man’s land” that is preventing them from building the facilities necessary to meet that demand. By issuing a declaratory ruling on these matters, the Commission will help satisfy its mandate in the 1996 Act to “encourage the deployment on a reasonable *and timely* basis of advanced telecommunications capability to all Americans” by utilizing “regulating methods that remove barriers to infrastructure investment.”<sup>126</sup>

#### **IV. THE COMMISSION SHOULD FURTHER STREAMLINE ENVIRONMENTAL REVIEWS TO SPEED DNS DEPLOYMENT.**

ExteNet supports the Commission’s decision to take a “comprehensive fresh look at [its] rules and procedures implementing the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA),” particularly as they relate to DNS facilities.<sup>127</sup> The Commission can speed DNS deployments without compromising environmental and historic preservation concerns by streamlining NEPA, NHPA, and tribal reviews and addressing tribal fees as recommended below.

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<sup>126</sup> 47 U.S.C. § 1302(a) (emphasis added).

<sup>127</sup> *Wireless NPRM/NOI* ¶ 23.

**A. The FCC Should Streamline NEPA Reviews.**

**DNS Facilities.** DNS facilities should be categorically exempt from NEPA review in all respects, including the siting of new DNS support poles in the public rights-of-way.<sup>128</sup> Non-telecommunications users of utility poles are not subject to NEPA and, given that DNS attachments are similar to those of non-telecommunications users, there is no environmental impact reason to single out DNS attachments for NEPA review.

Currently, DNS attachments and other collocations are exempt from NEPA review as long as historic preservation and RF concerns are not present,<sup>129</sup> as are DNS support poles located in communications and utility ROWs if the poles are no more than 10% or 20 feet taller or 20 feet wider than proximate existing poles in the ROW.<sup>130</sup> The Commission should expand the existing ROW exemption to include not only communications and utility ROWs, but also transportation ROWS.

**Floodplains.** The Commission should eliminate its environmental assessment (“EA”) requirement for non-located facilities that are built in floodplains, provided those facilities are above the base flood elevation.<sup>131</sup> Presently, facilities in floodplains require an EA even if they will be built above the base flood elevation. If a facility is built above the base flood elevation,

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<sup>128</sup> See *id.* ¶ 65 (requesting comment on whether Commission should consider new categorical exclusions for small cells and DAS facilities).

<sup>129</sup> See 47 C.F.R. § 1.1306 note 1. Historic preservation exclusions under the NHPA for DNS facilities as discussed in Section IV.B below.

<sup>130</sup> See *id.* § 1.1306(c). The facility must also not involve the installation of more than four new equipment cabinets/one new equipment shelter, or excavation outside the current site. *Id.* In addition, the installation of wire and cable is categorically excluded from both environmental and historic preservation review if installed in aerial or underground corridors of prior or permitted use. *Id.* § 1.1306 note 1.

<sup>131</sup> See *Wireless NPRM/NOI* ¶ 65 (requesting comment on whether the Commission should revise its rules “so that an EA is not required for siting in a floodplain when appropriate engineering or mitigation requirements have been met”) (citations omitted).

its EA is typically granted (assuming it has a building permit).<sup>132</sup> An EA is redundant under those circumstances, yet applicants and Commission staff still must devote their limited resources to preparing, reviewing and processing such EAs. Consequently, construction of facilities is delayed and deployment cost is increased, with no countervailing benefit to the public.

## **B. The FCC Should Streamline NHPA Reviews.**

The Commission should also maximize the exclusions from NHPA review applicable to DNS facilities, given their small size and minimal potential impact on historic resources. While the Commission is to be commended for its continuing efforts to streamline and eliminate unnecessary historic preservation reviews for wireless deployments, including DNS facilities, these efforts have created a complex and confusing set of categorical exclusions. As a result, applicants may choose to go through the Section 106 process rather than analyze categorical exclusions which may not provide clear guidance. This, obviously, is the opposite of what the exclusions are supposed to achieve.

The Commission thus should further streamline its categorical exclusions by establishing broad exclusions for:

- DNS facilities installed on existing traffic control and lighting structures, regardless of whether they are located in a historic district, provided that (for deployments in historic districts) a qualified consultant confirms that the traffic or light structure is not a contributing element;<sup>133</sup>

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<sup>132</sup> See, e.g., FCC, *Final Programmatic Env'tl. Assessment for the Antenna Structure Registration Program*, at 5-8 (Mar. 13, 2012), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-312921A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-312921A1.pdf); Robert B. Jacobi, Esq., Letter, 26 FCC Rcd 3883, 3892 (MB 2011); Andrew Skotdal, President, S-R Broadcasting Co., Inc., Letter, 23 FCC Rcd 8574, 8583 (MB 2008); *Application of American Tower Corporation For Tower Registration with Environmental Assessment*, Memorandum Opinion and Order, 21 FCC Rcd 1680, 1683-84 ¶ 10 (WTB 2006).

<sup>133</sup> *Wireless NPRM/NOI* ¶ 66. These deployments are currently excluded only case-by-case, if the deployment meets certain size and ground disturbance limitations *and* the SHPO agrees (or fails to object) within 30 days that the structure is not a contributing element. See Collocation

- DNS and other pole replacements, regardless of whether they are located in a historic district, provided that the replacement pole is not substantially larger than the pole being replaced. For the purpose of this exclusion, substantially larger refers to a replacement pole that would be more than 10% or 20 feet taller than the pole being replaced;<sup>134</sup>
- Any DNS or other communications facility located in a public right-of-way, including a transportation ROW, regardless of whether it is located in a historic district, provided the facility is not substantially larger than other existing structures located in the same vicinity in the ROW;<sup>135</sup> and
- DNS attachments and other collocations that have received local historic preservation approval, *i.e.*, where “(1) the proposed collocation has been reviewed and approved by a Certified Local Government that has jurisdiction over the project; or (2) the collocation has received approval, in the form of a Certificate of Appropriateness or other similar formal approval, from a local historic preservation review body that has reviewed the project pursuant to the standards set forth in a local preservation ordinance and has found that the proposed work is appropriate for the historic structure or district.”<sup>136</sup> This exclusion should apply regardless of whether the collocation will be located in/on a historic property/district.

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Agreement § VII.C. This case-by-case SHPO review is unworkable, given the importance of these structures to 5G deployments. The Commission should eliminate the need for case-by-case SHPO consultation.

<sup>134</sup> *Wireless NPRM/NOI* ¶¶ 67-68. The Commission currently excludes replacement towers, but not poles, that meet these size limits. See *Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process*, 47 C.F.R. Pt. 1, App. C, § III.B (Sept. 2004) (“NPA”). The exclusion should be expanded as described to include replacement poles, including those whose primary purpose is not to support an FCC-licensed antenna.

<sup>135</sup> *Wireless NPRM/NOI* ¶¶ 69-71. Current provisions of the NPA exclude from NHPA review facilities constructed in utility and communications ROWs that are not substantially larger (more than 10% or 20 feet taller or 20 feet wider) than nearby existing structures, subject to the need for tribal review and the avoidance of construction within a historic property. See NPA § III.E. The exclusion should be expanded to include the construction or collocation of communications infrastructure in any ROW, including a transportation ROW; the need for tribal review should be eliminated where there is no new ground disturbance; and the exclusion should apply regardless of whether the ROW is located on a historic property.

<sup>136</sup> *Wireless NPRM/NOI* ¶ 75.

**C. The FCC Should Streamline Tribal Reviews and Address Tribal Fees.**

ExteNet supports the joint CTIA/WIA comments on the Tribal review issues raised in the *Wireless NPRM/NOI*.<sup>137</sup> In addition, the Commission should take the following steps to facilitate DNS deployments. First, the Tower Construction Notification System (“TCNS”) should be upgraded to accommodate the submission and consideration of multiple DNS nodes as a single project. Second, multiple related nodes in a single geographic area that are part of the same project should be assessed a single fee, and not a separate fee for each individual node.

**V. THE COMMISSION SHOULD REFORM ITS POLE ATTACHMENT RULES AND PROCEDURES.**

ExteNet supports reforms to the Commission’s pole attachment rules. As the Commission observes, “[p]ole attachments are a key input for many broadband deployments,”<sup>138</sup> and this is especially true with respect to DNS facilities. Access to poles is essential to the success of DNS – it is neither feasible nor desirable for DNS providers to construct a new pole or other structure every time they need to deploy a new facility. It is far more efficient and cost-effective for DNS providers to collocate on existing poles. Accordingly, as discussed below, the pole attachment process should be streamlined, make-ready charges should be limited to actual costs, and a shot clock should apply to the resolution of pole attachment complaints.

**A. The Pole Attachment Process Should Be Streamlined.**

**1. The FCC Should Shorten Its Pole Attachment Timeline.**

The Commission should adopt its proposal to shorten its timeframes for the various stages of its pole attachment timeline. As the Commission recognizes, “[a]ccess to poles,

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<sup>137</sup> See Joint Comments of CTIA and the Wireless Infrastructure Association, WT Docket No. 17-79 (filed June 15, 2017); *Wireless NPRM/NOI* ¶¶ 42-64.

<sup>138</sup> *Wireline NPRM/NOI* ¶ 3.

including the preparation of poles for new attachments, must be timely in order to constitute just and reasonable access under Section 224 of the Act.”<sup>139</sup>

Initially, the Commission should adopt a time limit on pre-application pole attachment negotiations, which often are required *before* a pole attachment application is actually filed. The Commission’s pole attachment timeline currently does not account for such pre-application negotiations, allowing utilities to stretch the process out without violating the pole attachment timeline. This unnecessarily delays deployment and raises transaction costs. Accordingly, the Commission should impose a 60-day time limit on pre-application pole attachment negotiations. The 60-day period should be triggered by written notice from the attaching party to the utility pole owner that it wishes to commence discussions. Where such discussions fail to produce an agreement within 30 days, the attaching party should be permitted to enter into a model “safe harbor” pole attachment agreement that could be developed by the BDAC, in consultation with utilities and DNS providers.

As to the timeline itself, the Commission has noted the following: “Although we establish this timeline as a maximum, we recognize that the necessary work can often proceed more rapidly, especially at the estimate and acceptance stages, . . . for relatively routine requests.”<sup>140</sup> ExteNet’s experience with pole attachments since 2011 has confirmed this. For example, ExteNet has found that utilities are capable of acting on pole attachment applications in less than 45 days. Also, because DNS facilities are small and have relatively straightforward attachment requirements, make-ready work for DNS attachments can be completed in

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<sup>139</sup> *Id.* ¶ 7 (citation omitted); *see id.* (requesting comment on whether to modify the current pole attachment timeline, which establishes deadlines by which the various steps of the pole attachment process must take place).

<sup>140</sup> *Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240, 5252 ¶ 23 (2011) (“*2011 Pole Attachment Order*”).



substantially less than 60 days in the communications space and substantially less than 90 days above the communications space.

Therefore, the Commission should shorten the application review/survey period from 45 days to 30 days, and shorten the estimate and acceptance periods from 14 days each to seven days each.<sup>141</sup> The Commission should also adopt its proposal to align its make-ready timeframes with the “best practices” recommended in the *2011 Pole Attachment Order*.<sup>142</sup> The make-ready period for small pole attachment requests thus should be shortened to 30 days; for medium sized requests, the period should be shortened to 45 days. These revised time frames should apply equally to attachments in or above the communications space.<sup>143</sup>

Critically, the Commission should adopt a “deemed granted” remedy under which an application for pole access is automatically deemed approved where the utility fails to act in 30 days (or 45 days, in the case of medium sized requests). Under the current timeline, where a utility fails to act within the requisite time period, the attacher’s remedy is to either hire a contractor to conduct the necessary survey or, if the attachment is above the communications space, file a complaint with the Commission.<sup>144</sup> Neither of these alternatives facilitates timely deployment of DNS facilities, as they provide utilities little incentive to observe the application

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<sup>141</sup> See *Wireline NPRM/NOI* ¶¶ 9-10.

<sup>142</sup> *Id.* ¶ 11.

<sup>143</sup> In the *2011 Pole Attachment Order*, the Commission cited safety concerns (related to equipment being placed in, near or above the electric space) and insufficient experience (with application of state timelines to attachments above the communications space) as justification for allowing an extra 30 days for completion of make-ready work above the communications space. *2011 Pole Attachment Order*, 26 FCC Rcd at 5262 ¶ 42. Experience since then has rendered both concerns moot – wireless attachments above the communications space have been safely and routinely installed in the six years since the release of the *2011 Pole Attachment Order*, and there is no longer any reason to treat them differently than attachments in the communications space.

<sup>144</sup> See *id.* at 5253-54.

review/survey deadline if they are not inclined to do so. The Commission should make it clear that applications not acted upon within the requisite time frame will be deemed granted, and that the parties must thereafter proceed to the estimate, acceptance, and make-ready segments of the pole attachment timeline.

## **2. The FCC Should Adopt Processes to Accelerate Make-Ready Work.**

*Use of Utility Approved Contractors.* The Commission should amend its pole attachment rules to permit new attachers to use utility-approved contractors to perform make-ready work immediately when an existing attacher(s) fails to do so within the time required by the Commission.<sup>145</sup> As the Commission has previously stated, “[t]he transfer of control to the new attacher, including the ability to hire contractors, is the key to the effectiveness of the timeline.”<sup>146</sup>

Under the current rules, utilities are given 15 days to complete make ready work not completed by existing attachers by the Commission’s make-ready deadline, *i.e.*, 60 days for attachments in the communications space and 90 days for attachments above the communications space.<sup>147</sup> This means that a new attacher could be required to wait as long as 75 and 105 days, respectively, before it may use utility-approved contractors to complete make-ready work. New attachers should not be required to endure such delays, particularly since the use of utility-approved contractors mitigates any concerns that such contractors are

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<sup>145</sup> See *Wireline NPRM/NOI* ¶ 14.

<sup>146</sup> See *2011 Pole Attachment Order*, 26 FCC Rcd at 5265 ¶ 50.

<sup>147</sup> 47 C.F.R. § 1.420(e)(1) and (e)(2)(ii).

unqualified.<sup>148</sup> It is more appropriate to allow new attachers to use utility-approved contractors immediately after the make-ready deadline has passed, if not sooner.

The Commission should not require that all impacted attachers agree on the contractor that a new attacher may use to perform make-ready work.<sup>149</sup> Such approval is unnecessary if the contractor has already been approved by the utility. The Commission also should not require that new attachers give existing attachers an opportunity to observe the contractor's work while it is being done.<sup>150</sup> This requirement will only risk further delays in the process without achieving a better result. Further, both the utility and existing attachers must be subject to a reasonableness requirement when evaluating whether the contractor's work is satisfactory. The benefits of allowing new attachers to use utility-approved contractors will be lost if utilities and/or existing attachers are given unlimited discretion to reject their work. Utilities must also be prohibited from imposing unreasonable requirements while the work is being done, *e.g.*, a requirement that the new attacher repair or modify poles that are out of compliance with State statutes, local codes or pole utility standards.

***One-Touch Make-Ready Option for New Attachers.*** ExteNet supports adoption of a one-touch make-ready ("OTMR") process, which has multiple advantages.<sup>151</sup> It allows construction to be completed faster and more safely than having multiple contractors at each pole; benefits residents by allowing access to new services more quickly and decreasing inconveniences caused by make-ready work, including noise, traffic disruptions, and service

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<sup>148</sup> See *2011 Pole Attachment Order*, 26 FCC Rcd at 5266 ¶ 52 ("[O]ur requirement that attachers use contractors that the utility has approved should substantially limit concerns about contractor qualifications.").

<sup>149</sup> See *Wireline NPRM/NOI* ¶ 17.

<sup>150</sup> *Id.*

<sup>151</sup> See *id.* ¶ 21 (requesting comment on the potential benefits and drawbacks of a pole attachment regime patterned on an OMTR approach).

outages; and decreases the time and capital cost of construction, which lowers barriers to entry. ExteNet recommends an OTMR process that shortens the timeline for post-make-ready inspection to 14 days and requires existing attachers to notify the new attacher of any problems within seven days after inspection.<sup>152</sup>

### **3. The FCC Should Clarify that a DNS “Attachment” Includes the Antenna and All Appurtenances.**

To give DNS providers greater certainty and minimize the potential for disputes, the Commission should amend its definition of “pole attachment.” Under Section 1.1402(b) of the Commission’s rules, the term pole attachment means “*any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”<sup>153</sup> Notwithstanding the fact that the rule encompasses “any” attachment, utilities have sometimes refused to permit ExteNet to attach anything to their poles other than an antenna. To address this, the Commission should make it clear that, where DNS facilities are concerned, the definition of “pole attachment” includes not only the antenna but also the fiber, ground furniture and other equipment that is part of the same installation.<sup>154</sup>

#### **B. Make-Ready Charges Must Be Limited to Actual Costs.**

The Commission should amend its rules to clarify the meaning of “just and reasonable” charges as it applies to make-ready work.<sup>155</sup> ExteNet has found that utilities may inflate their

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<sup>152</sup> *Id.* ¶ 23.

<sup>153</sup> 47 C.F.R. § 1.1402(b) (emphasis added).

<sup>154</sup> In addition to the antenna, this would include but not be limited to support mast and mounts, fiber optic cable and cable equipment, amplifiers, conduits, coaxial cable, receivers, battery units, equipment cabinets, through bolts, washers, nuts, power supply cabinets, power meters, and grounding or bond wires.

<sup>155</sup> See *Wireline NPRM/NOI* ¶ 32 (noting that make-ready charges must be “just and reasonable” under Section 224(b)(1) of the Act).

make-ready costs to recover money they believe they have lost from having to charge lower attachment rates. Make-ready reimbursement was not intended to be used in this fashion.

Thus, make-ready charges should be deemed “just and reasonable” when limited to the actual cost of accommodating a new attachment, excluding any amounts that existing attachers must spend to fix pre-existing problems and any amounts that the utility must spend to bring the relevant pole into compliance with local codes. Also, the Commission should permit make-ready charges, at a new attacher’s election, to be paid as a per-pole charge. If properly tied to actual cost, a per-pole make-ready charge will allow utilities to recover their make-ready costs without requiring a separate negotiation over the applicable costs to be included in make-ready charges for each pole.

**C. The FCC Should Adopt a Shot Clock for Pole Attachment Complaints.**

The Commission should adopt its proposal to impose a shot clock for resolution of pole access complaints under Section 1.1409 of its rules.<sup>156</sup> Absent a shot clock, the FCC’s complaint process simply is not a practical means of enforcing pole attachment rights. This is because utilities know that pole attachment complaints can be litigated almost indefinitely. As a result, when a utility fails to comply with the Commission’s pole attachment rules, a DNS provider often effectively has no choice but to wait the utility out and hope it eventually cooperates – the complaint process offers no hope of near term relief. Likewise, where a utility offers a DNS provider an unreasonable attachment rate, the DNS provider may simply pay the rate in order to obtain faster access to poles, rather than fight the matter out at the Commission via a pole attachment complaint.

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<sup>156</sup> See *id.* ¶ 47.

For a shot clock to have any remedial effect, however, it must be short enough to allow timely deployment of facilities if the attaching party's complaint is successful. The Commission's proposal to adopt a 180-day shot clock for pole access complaints will not achieve that result.<sup>157</sup> By the time the need to file a complaint arises, the attaching party will likely already have spent weeks (and perhaps longer) attempting to negotiate with the relevant utility for access to its poles on fair and reasonable terms. Adding another six months to the process, while better than no shot clock at all, will not facilitate timely deployment of DNS facilities. Given that access disputes are relatively straightforward (either the attaching party has been given access to a pole, or it has not), such complaints should be subject to a 75-day shot clock at most.<sup>158</sup>

The Commission should adopt its proposal to start the shot clock upon filing of the complaint,<sup>159</sup> and the shot clock should be tolled only by mutual agreement of the parties. No pre-complaint meetings to establish procedural dates should be required; the Commission's rules already set forth the most relevant deadlines, and any additional procedural issues can be resolved after the complaint is filed.<sup>160</sup> In addition, the Commission should confirm that attaching parties may continue to avail themselves of the "sign and sue rule," under which the attaching party may agree to the pole owner's terms and attach its facilities without forfeiting its right to file a complaint.<sup>161</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> To ensure that the Enforcement Bureau has sufficient time to consider the record, the Commission should consider shortening the answer and reply periods in Section 1.1407(a) of its rules to 15 days and 10 days, respectively.

<sup>159</sup> *Id.* ¶ 48.

<sup>160</sup> *Id.* ¶ 50.

<sup>161</sup> See *Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company*, Order, DA 17-395, ¶ 24 (EB rel. May 1, 2017) (discussing sign and sue rule).

A 75-day shot clock should also apply to non-access related complaints. Disputes over non-access issues (particularly rates) can have the same chilling effect on deployment as disputes over access, and thus non-access complaints should be afforded a similar shot clock under the Commission's rules.

## **VI. CONCLUSION.**

DNS providers are a critical link to the rapid and successful deployment of the next generation of wireless services, but they cannot fulfill that role without timely access to infrastructure in public rights-of-way. The current regulatory framework provides them little assurance of such access, and the result has been excessive delays and other substantial barriers to deployment. The *Wireless NPRM/NOI* and *Wireline NPRM/NOI* are essential steps towards removing those barriers. To realize the promise of DNS, the Commission must act now on its proposals in both dockets, in accordance with the comments set forth above.

Respectfully submitted,

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